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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,

AND

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION, as Conservator for
FRANKLIN SAVINGS ASSOCIATION,
Respondents.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Second Circuit vacated a post-trial judgment against respondent Resolution Trust Corporation (the "RTC") in which the District Court had declared that, because the agency official who purported to repudiate $2.9 billion of secured zero coupon bonds "on behalf of the RTC had not received a delegation of power to do so," that official's action "did not constitute a legally effective repudiation by the RTC." This petition seeks review of the Court of Appeals' determination — which is based upon factual findings on issues that were never raised by any party, concerning which no evidence was ever submitted, and that the District Court thus never considered — and presents the following questions:

1. Whether the Court of Appeals reversed the judgment in petitioners' favor on the basis of new factual findings made by the Court of Appeals in the first instance as to issues that were never raised by respondent (at trial or on appeal) in violation of petitioners' rights to be heard on those issues.

2. Whether governmental powers that by statute and bylaws have been expressly delegated to specified officials may be exercised by lesser officials to whom the powers have not been expressly sub-delegated.

PARTIES INVOLVED

In addition to the parties listed in the caption, petitioner IBJ Schroder Bank & Trust Company ("Schroder") states that its majority shareholder is The Industrial Bank of Japan, Limited, the securities of which are listed on the Tokyo Stock Exchange. Schroder has no subsidiaries or affiliates having securities listed on a securities exchange in the United States.

Petitioners the Employees' Retirement System of Alabama; the Teachers' Retirement System of Alabama; the Board of Control of the Employees' Retirement System of Alabama; the Board of Trustees of the Maryland State Retirement and Pension Systems; Miller, Anderson & Sherrard; Fiduciary Trust Company International; and Pacific Mutual Life Insurance Company each states that it has no corporate parents, subsidiaries or affiliates that have issued shares to the public. Petitioner Banker's Trust Company as Trustee for Textron, Inc. Master Trust states that Textron, Inc. is the parent company of Textron, Inc. Master Trust; petitioner Connecticut General Life Insurance Company states that CIGNA Corporation is the ultimate parent company of Connecticut General Life Insurance Company and that INA Investment Securities, Inc. and CIGNA High Income Shares are affiliates of Connecticut General Life Insurance Company; and petitioner TransAmerica Life and Annuity Company states that TransAmerica Corporation is the parent company of TransAmerica Life and Annuity Company.

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RESOLUTION TRUST CORPORATION, as Conservator for
FRANKLIN SAVINGS ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully petition this Court for a writ of certiorari to review the Order of the United States Court of Appeals for the Second Circuit, which reversed the post-trial judgment of the United States District Court for the Southern District of New York

(Leval, J.) in favor of petitioners against respondent, the Resolution Trust Corporation (the "RTC").

Review by this Court is warranted at this stage of the case because the Court of Appeals' decision: (a) is based upon new factual findings made by the Court of Appeals in the first instance as to matters that were neither raised by any litigant nor considered by the District Court and as to which petitioners had no opportunity to be heard, and (b) conflicts with decisions from other Circuits on an important question of law: whether governmental powers that have been expressly delegated to one person may be exercised by a lesser official in the absence of an express sub-delegation. This Court's determination of these questions may fully or partially dispose of this $2.9 billion dispute.

OPINIONS AND ORDERS BELOW

The June 15, 1994 Opinion of the Court of Appeals is reported at 26 F.3d 370 and reproduced in Appendix ("App.") A, *infra*, 1a to 14a. The Court of Appeals' August 17, 1994 Order denying rehearing and rehearing *in banc* is unreported and reproduced in App. B., *infra*, 15a. The October 13, 1992 Opinion and Order of the District Court granting judgment for petitioners is reported at 803 F. Supp. 878 and reproduced in App. C, *infra*, 17a to 38a. The October 21, 1992 Judgment of the District Court is reproduced in App. D, infra, 39a to 40a. That court's July 23, 1993 Opinion and Order denying respondent's motions for relief from, or an amendment of, the judgment, or, in the alternative, for a new trial is not reported and is reproduced in App. E, *infra*, 41a to 59a.

JURISDICTION

The District Court had jurisdiction under 5 U.S.C. § 702; 12 U.S.C. §§ 1441a and 1819; and 28 U.S.C. §§ 1137 and 1331. The Court of Appeals' jurisdiction was based on 28 U.S.C. § 1291. The opinion of the Court of Appeals was entered on June 15, 1994. Timely petitions for rehearing by the plaintiff-intervenors and plaintiff were denied on August 17, 1994 and August 19, 1994, respectively, and this petition is being filed within 90 days of those dates. This Court has jurisdiction to review the order of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part:

> "[N]or [shall any person] . . . be deprived of . . . property, without due process of law . . . ."

2. The principal statutory provision involved in this case, 12 U.S.C. § 1821(e), enacted in § 212 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), is reproduced in App. F, *infra*, 60a to 63a.

STATEMENT OF THE CASE

A. Statement Of Facts

Franklin Savings Association ("Franklin") issued $2.9 billion in face amount of zero coupon bonds (the "Bonds") pursuant to an indenture (the "Indenture") dated as of December 1, 1984. The Bonds were non-callable and fully secured by the highest quality collateral, in which the indenture trustee held a perfected first security interest.[1] App. C, 21a. Petitioner IBJ Schroder Bank & Trust Company is the indenture trustee (the "Trustee").

Because they are zero coupon bonds, the Bonds do not pay periodic interest, but entitle the holder to receive the full face amount of the Bonds at maturity. At issuance in 1984, the return on investment for each Bond was consistent with then prevailing market rates for comparable long-term securities.

Petitioners other than the Trustee (the "Bondholders") are several state pension funds, insurance companies and investment advisors that are the source of retirement benefits for more than 400,000 persons nationwide. The Bondholders paid

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[1] In the event of a failure by Franklin to comply with certain regulatory minimum capital requirements, the Indenture required the Trustee to "defease" the Bonds by executing on the security interest, selling the collateral and purchasing stripped Treasury or similar agency zero coupon securities in an amount sufficient to pay the full principal amount of the Bonds at their maturity.

$129 million for approximately 80% of the Bonds now outstanding in arm's-length, secondary market transactions between 1984 and January 1990.

No law existing when the Bonds were issued could reasonably have been interpreted as limiting the Bondholders' right to receive the full face amount of their Bonds at maturity, either directly from the issuer or as a result of defeasance by the Trustee.

Following the RTC's appointment as Franklin's conservator in 1990, William H. Roelle (the "Official"), the RTC's Director of Resolutions and Operations, purported to repudiate the Bonds and Indenture on behalf of the RTC. This lawsuit followed.

The Official was not a member of the RTC's Board of Directors. The RTC Board did not vote to repudiate the Bonds, nor did the Board delegate to the Official the authority to do so. App. C, 35a.

B. The District Court Opinion

The threshold issue at trial, and the only issue decided and appealed, was whether the Official's action (a) constituted the action of the RTC, or (b) was of no effect because it was unauthorized.[2] That question has two parts: First, did Congress give the Official the power to repudiate contracts? Second, if not, did he obtain that power some other way?

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[2] The dispute among the parties involves issues other than this threshold issue, including the RTC's obligation to pay damages upon a repudiation. Those issues are currently being litigated in an action, recently consolidated with this action in the District Court and involving the same parties, entitled *Employees' Retirement Systems, et al. v. The RTC*, 92 Civ. 8435 (S.D.N.Y.) (Leval, J.)

There has never been any dispute as to the first question. The RTC, the District Court, and the Court of Appeals all agree that Congress gave the repudiation power to the Resolution Trust Corporation and that the corporation's bylaws gave that power to its Board, and to no one else.[3] App. A, 11a; App. C, 34a. Thus, there is no dispute that, unless the Board somehow conferred its repudiation power upon the Official, his attempted repudiation was a nullity.[4]

("*Franklin II*"). The Court of Appeals' opinion did not purport to resolve those issues.

[3] Pursuant to Congress's command that the RTC "prescribe through its Board of Directors bylaws that shall be consistent with the law" (12 U.S.C. § 1441(b)(10)(J)), the RTC adopted bylaws vesting all of the corporation's statutory powers and the power to manage the corporation in its Board of Directors. By contrast, the bylaws expressly provide that all other RTC representatives have only those powers that the RTC Board "prescribe[s]." *See* App. A, 10a (quoting RTC's bylaws).

[4] When a corporate employee acts beyond the scope of his authority, the action is not binding as against third parties with whom the agent dealt. 2 Samuel Williston, *Williston on Contracts*, § 278A at 278 (3d ed. 1959); *Restatement (Second) of Agency*, § 88 (1958). This common law principle applies with equal force to governmentally created corporations and agencies. *See United States v. True*, 946 F.2d 682, 686-87 (9th Cir. 1991); *Lopez-Telles v. INS*, 564 F.2d 1302, 1303-04 (9th Cir. 1977); *United States v. Gemmill*, 535 F.2d 1145 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976).

On the second question the RTC's counsel made a single argument at trial: that the Board had formally, expressly delegated its repudiation power to the Official in October 1989 as part of a comprehensive set of written delegations to various RTC officials. The RTC did not argue at trial that the Board had impliedly delegated its power to the Official, or had expressly or impliedly ratified the Official's action. The District Court's opinion, which addresses the RTC's argument and rejects it, makes that clear. App. C, 36a. Petitioners were, thus, induced to take discovery and try the case in a manner designed to meet only the argument that the RTC had made.

The RTC's evidentiary proffer to prove this express delegation was strikingly meager. The RTC relied entirely on the text of a single paragraph in the lengthy set of delegations adopted in 1989, the so-called "power of attorney" provision.[5] No member of the RTC's Board testified. There was no testimonial or documentary evidence as to the meaning of the delegations or the Board's intent in adopting them.[6] No minutes of Board meetings evidencing such intent were offered as evidence. Indeed, the only evidence on this question (other than the text of the power of attorney provision itself) contradicted the RTC's counsel's argument that the Board had delegated the repudiation power to the Official: the Official *twice* testified that he was unaware of any delegation of the repudiation power to him. *See* Deposition transcript of William H. Roelle, dated April 7, 1992 at 10 and deposition transcript of William H. Roelle, dated July 17, 1992 at 66; appearing in the Joint Appendix filed before the Court of Appeals ("J. App.") at A1165 and A1482.

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[5] That provision conferred the authority "[t]o execute powers of authority on behalf of the Corporation, as conservator, receiver, or in its corporate capacity, for the purpose of granting such powers as may be convenient in the disposition of assets acquired or controlled by the Corporation or for the exercise of all the powers conferred upon the Corporation as receiver . . . ." App. C, 35a.

[6] No witness ever authenticated the written delegation upon which the RTC relied, or testified as to when or how it was adopted. The Official was unaware of its existence.

After presiding over the case for thirty months, issuing several preliminary rulings, and receiving testimony from two RTC witnesses, the District Court rejected the only argument that the RTC presented at trial — that the Board had expressly delegated the repudiation power to the Official in the "power of attorney" provision of the 1989 delegations. Finding the full set of delegations to be "extremely detailed," "highly specific," and "carefully circumscribed," the District Court concluded:

- "Nowhere among these extensive detailed delegations to [the Official] is there one relating to the repudiation of contracts."
- The RTC's argument that the "power of attorney" delegation applied was "a combination of hyper-literal reading and loose interpretation" that "makes nonsense of the elaborately crafted and carefully circumscribed delegations to [the Official]'s office," and

would render the bulk of the document "a nullity."

- The delegations to the Official prescribe monetary limits of his authority far below the $2.9 billion face amount of the Bonds he attempted to repudiate.
- The "simple fact is" that the RTC Board did not delegate its repudiation power to the Official.

In sum, the District Court held:

> I conclude that the RTC did not effectively repudiate Franklin's zero coupon bonds. The fact that an unauthorized official of the RTC purported to repudiate on RTC's behalf did not constitute a legally effective repudiation by the RTC.

App. C, 37a.

C. The Second Circuit Opinion

The Second Circuit did not disagree with the District Court's crucial finding that the specific delegation exclusively relied upon by the RTC below — the "power of attorney" provision — did not constitute a delegation of the repudiation power to the Official. Indeed, the Court of Appeals failed even to *mention* that provision of the 1989 delegations in its opinion.

The Court of Appeals in fact agreed with the District Court on the critical issues actually litigated below: (a) Congress did not vest the Official with repudiation power, (b) the RTC's witnesses had identified no Board action delegating that power to the Official, and (c) the *only* provision of the delegations relied on by the RTC's counsel did not authorize the repudiation. App. A, 11a.

However, to the total surprise of all litigants, the Court of Appeals then focused upon an entirely different paragraph of the 1989 delegations, a "catch-all" provision appearing at the end of the 48 separate delegations to the Official.[7] This provision had never

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[7] The catch-all provision cited by the Second Circuit empowered the Official:

> To do such other things necessary to carry on a savings association's business and to conserve and preserve a savings association's assets and property, including the authority to borrow money in the name of a savings association . . . and to execute, acknowledge, and deliver evidence of indebtedness therefor and secure repayment thereof by mortgage, pledge, assignment in trust, or hypothecation of any property of a savings association, *provided, however*, that authority may not be delegated to any Managing Agent to enter the Joint Lending Program among the Federal Home Loan Banks, Federal Reserve Banks and FSLIC without the concurrence of the appropriate Regional Director: *provided, further, no actions taken pursuant to this paragraph shall exceed the authority*

been relied on, or even mentioned in any brief, testimony, or oral argument in the District Court, in the briefs on appeal, or at oral argument before the Court of Appeals.[8]

The Court of Appeals' departure from general appellate practice foreclosing appellate review of issues not raised below and its citation of this catch-all provision remain puzzling, however, because the Court of Appeals did *not* conclude that the catch-all paragraph (which expressly states that it does not delegate powers exceeding those specifically delegated elsewhere) constitutes an express delegation of the Board's repudiation power to the Official. As the Court of Appeals stated: "neither the bylaw nor the delegation of power thereunder contains a specific reference to repudiation." App. A, 11a.

> *delegated pursuant to any other Section of these Delegations of Authority.*

(emphasis added).

[8] In these circumstances, the Court of Appeals' reliance upon the "catch-all" provision was inappropriate. *Terkildsen v. Waters*, 481 F.2d 201, 204-05 (2d Cir. 1973) ("[a]dherence to rule [foreclosing appellate review of an issue not raised below] is particularly apt where . . . factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court"), *citing*, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

Rather, the Court of Appeals concluded that this catch-all provision created an ambiguity in the entire 61-page delegation document as to the Board's intent. In so concluding, the Court of Appeals again embraced an argument never previously offered by the RTC's counsel or its witnesses and made new findings on issues never litigated below. The RTC had never asked the District Court to search the interstices of the language of the delegations or to rely on parol evidence to interpret them. Indeed, no parol evidence had been offered at trial. For reasons never disclosed, the RTC's counsel stubbornly refused to offer any testimonial or contemporaneous written evidence to buttress its arguments about express delegation. To the contrary, the RTC argued at trial only that the agency's delegation *expressly* authorized the Official to repudiate the Bonds — an argument that the District Court considered nonsensical. App. C, 36a.

Having assumed an ambiguity into existence, the Court of Appeals then undertook to resolve it.

The Court of Appeals concluded that the best evidence of the Board's intentions in adopting the delegation was (a) the conduct of the RTC's counsel in filing pleadings in this litigation, and (b) the extent to which the Official's conduct in this case comported with his standard routine. Once again, the Court of Appeals ventured into an area of fact finding that no party had asked the District Court to explore and that the District Court had not explored.

The Court of Appeals first relied on the fact that the RTC's counsel had filed an answer and counterclaim repeatedly stating that the RTC had repudiated the Bonds. The Court of Appeals apparently concluded that this pleading was made either at the direction of or with the knowledge and approval of the Board or that the Board subsequently became aware of the pleading and acquiesced in it by its silence. There is no evidence to support either proposition although either proposition could have easily been established at trial were it true.[9] There is no evidence that the RTC Board was ever advised of the Official's purported repudiation or made aware of this litigation or the challenge to the Official's attempted repudiation.

The Court of Appeals then drew comfort from its assumption that the Official's exercise of the repudiation power was "in accordance with the RTC's customary practice." App. A, 13a. But, here again, no party had litigated the case below on this theory, and there was no evidence in the record whatsoever as to who performed the numerous other repudiations ordered by the RTC during the relevant period. Thus, there was no basis for the Court of Appeals' implicit conclusion that the numerous other repudiations likewise had not been carried out in accordance with the RTC's express delegations and bylaws.[10] If they too had been undertaken by the Official, it certainly would have been an easy proposition for the RTC to establish at trial using information within its exclusive control, had the RTC chosen to do so.

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[9] In fact, the only evidence plainly establishes the opposite. The Official testified unequivocally that he had not authorized the filing of the RTC's pleadings in this case, had not read them, was not directing the conduct of the litigation, and assumed that the legal department, not the Board, was doing so. Deposition transcript of William H. Roelle, dated July 17, 1992 at 23-24; J. App. at A1477-78.

Thus, the Court of Appeals' conclusion that the RTC's delegations, "as interpreted and applied by its Board, authorized [the Official] to make the repudiation decision at issue herein" was premised on two (false) factual assumptions, the falsity of which was plainly established by the record. No party had contended in the District Court or the Court of Appeals that either of these factual assumptions was true.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals Based Its Ruling On Appellate Findings Of Fact As To Matters Not Raised Below And As To Which Petitioners Have Not Been Afforded An Opportunity To Be Heard

The Court of Appeals overstepped its function as an appellate court by making new findings of fact concerning issues that no party had raised at trial or on appeal. As detailed above, the RTC tried its case on the theory that the "power of attorney" provision expressly delegated the repudiation power to the Official. No party had contended that the Board's 1989 delegations or bylaws were ambiguous or that extrinsic evidence was necessary for their interpretation.

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[10] Not only was there no evidence in the record to support such a conclusion, but the undisputed evidence directly contradicts it. Three years after the enactment of FIRREA, Roelle testified that he had repudiated contracts in this matter and in *only one other*.

The Court of Appeals found, *sua sponte*, that the "catch-all" provision created an ambiguity in the entire 61-page delegation document.[11] The Court of Appeals also found, *sua sponte*, that this presumed ambiguity could be resolved — without a remand for fact-finding and without any arguments or briefing on the question — by reference to extrinsic "evidence" regarding the Board's supposed approval of this litigation and of the RTC's supposed "customary practice" of permitting repudiations by the Official.

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[11] As noted above, no party had claimed that an ambiguity existed, and the District Court had made no findings of fact about the "catch-all" provision singled out by the Court of Appeals as creating ambiguity because the RTC had never relied on that provision. In any event, the notion that this "catch-all" provision raises an ambiguity in the entire 61-page delegation document is belied by a faithful reading of the document as a whole. Moreover, the RTC's Board knew how to delegate its powers to officers and understood the need for a formal Board resolution when delegation was desired. For example, the Board expressly delegated to the Executive Director (an officer senior to Roelle) the power, with the concurrence of the General Counsel, "to terminate . . . existing contracts" entered into by the RTC *after* its appointment as conservator "where the execution of such contracts did not require Board approval." The resolution further provides "that current delegations procedure . . . requires *all requests for contract termination be presented to the Board for approval before any action is taken* . . . ." (emphasis added). Thus, the Board clearly appreciated that *it* must act to terminate pre-appointment contracts, and that delegations of its power must be made by express, formal Board resolution.

But there was simply no evidence in the record (or cited in the opinion) to support any of the Court of Appeals' conclusions, nor could there have been. No such evidence was ever adduced or presented at the trial because the RTC had never raised any contentions regarding the Board's knowledge or approval of the litigation or of the RTC's customary practices. That the Court of Appeals misapprehended these fundamental facts merely highlights the peril that results when appellate courts attempt fact-finding with respect to matters not raised below. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("injustice [is] more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard").

The District Court had made no findings as to any parol matters, as no parol evidence was offered (let alone briefed and distilled) by the parties. Where extrinsic evidence is necessary to determine the meaning of a statute, regulation, or contract, the meaning is a question of fact that must be left to the appropriate fact-finder. *See United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 66 (1956) (interpretation of tariff language requiring resort to extrinsic evidence was question of fact that should be decided by Interstate Commerce Act Commission in the first instance).[12]

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[12] Moreover, any such finding of fact should be overturned only if clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v.*

Thus, if the Court of Appeals found an ambiguity in the delegation, it should have remanded the case to the District Court to make factual findings upon consideration of any extrinsic evidence admitted at trial, where petitioners would have had an opportunity to present evidence themselves and cross-examine any witnesses of respondent on such issues.

Instead, the Court of Appeals raised and resolved these issues of its own accord for the first time on appeal, affording no opportunity for petitioners to be heard on these issues or to test the "evidence" on which the Court of Appeals' decision rests. Thus, the decision below impermissibly denied petitioners their "right to be heard before being condemned to suffer grievous loss of any kind." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Wolf v. McDowell*, 418 U.S. 539, 566 (1974) ("the right to present evidence is basic to a fair hearing").

The rule that parties must be allowed to present evidence in support of their claims also underlies the doctrine, ignored by the Second Circuit in this case, that an appellate court normally will not consider issues not raised below. *See Singleton*, 428 U.S. at 120 (court of

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Bessemer City, 470 U.S. 564, 573-74 (1985); *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1044 (2d Cir. 1992); *National Union Fire Ins. Co. v. Circle, Inc.*, 915 F.2d 986, 989 (5th Cir. 1990) (interpretation of contract language requiring resort to extrinsic evidence was a question of fact reviewed under the clearly erroneous standard).

appeals erred in considering an issue not raised below because the court had "no idea what evidence petitioner would or could offer . . . because petitioner has had no opportunity to proffer such evidence"); *Woodcrest Nursing Home v. Local 144 Hotel, Hosp., Nursing Home & Allied Sev. Union*, 788 F.2d 894, 899 (2d Cir. 1986) (issue first raised on appeal foreclosed because appellant "would be deprived of the opportunity to introduce further evidence on the subject").

B. The Second Circuit's Decision Conflicts With The Decisions Of Other Circuits On An Important Issue Concerning The Authority Of Government Officials.

The Court of Appeals' analysis ultimately rests on nothing more than its observation that the RTC Board never did anything to stop the Official's unauthorized conduct in this case. Thus, the Second Circuit adopted a new rule of law: that an agency's failure to challenge or implied tacit approval of an action taken without authority will be an effective substitute for an express delegation in the first instance, even in cases such as this one where there is no evidence of actual knowledge or approval of the action by the persons within the agency having the relevant authority.

The holding below conflicts with the law in other Circuits that governmental powers can be delegated only expressly. Indeed, other Circuits have found that the lack of express delegation is much more than a "procedural flaw," and have ruled that actions taken without properly delegated authority are null and void.

In so ruling, those Circuits have recognized the important policy considerations ignored by the Second Circuit: the government's powers must be exercised through clear and specific procedures in order to protect citizens from arbitrary and capricious conduct.

For example, in *Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977), a case on all fours with the instant one, the Ninth Circuit held that a government official may exercise only those powers specifically delegated to him by statute or regulation, and therefore declared void an immigration judge's attempt to terminate a deportation proceeding. The Ninth Circuit found that: (a) discretionary authority to terminate proceedings had not been expressly delegated to the immigration judge by statute or otherwise, (b) there was a "detailed and elaborate" description of the authority of immigration judges contained in applicable statutes and regulations, which did not mention discretionary authority to terminate proceedings (564 F.2d at 1303), and (c) the regulations expressly authorized other specified officials (*e.g.*, the "district director") to terminate proceedings. Unlike the court below, the Ninth Circuit refused to find that authority could be impliedly delegated beyond its express limits, and thus held that any attempt by the immigration judge to act without express delegation was a nullity. *Id.* at 1304.

The Ninth Circuit repeatedly has reaffirmed the rule that governmental authority must be expressly delegated. In *United States v. Emerson*, 846 F.2d 541 (9th Cir. 1988), defendants who had been convicted of distributing a newly- outlawed drug (MDMA or "Ecstasy") challenged their conviction on the ground that MDMA had been temporarily listed on "Schedule I" (the outlawed drug category) by an official to whom the power to perform that function had not been properly delegated — the Administrator of the DEA (the "Administrator"). The District Court rejected this contention, and the defendants were convicted. On appeal, the Ninth Circuit held that, although there were detailed delegations to the Administrator granting him authority to perform many scheduling functions, the authority to temporarily criminalize the possession of any drug (pursuant to which temporary scheduling the defendants were convicted) had *not* been properly delegated.

The Ninth Circuit noted that the Attorney General, who in 1970 had been given the authority to schedule drugs by statute, in 1973 by regulation had delegated to the Administrator those "[f]unctions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970," including the power to schedule drugs permanently. 846 F.2d at 547. However, the power to schedule drugs on a temporary emergency basis (with less stringent notice and comment requirements) was not conferred on the Attorney General until 1984 by an amendment to the Act. Because the delegations were not modified at the time of the amendment, the defendants argued that the Administrator had not been "specifically" delegated the authority to temporarily schedule drugs.

The Ninth Circuit agreed, stating that "we may not assume that the Attorney General's delegation of his authority [to permanently schedule a drug] was intended to encompass the emergency powers granted to him."

Id.[13] The Ninth Circuit held that "[a] failure to challenge or correct the Administrator's actions, or even tacit approval of those actions, is not a substitute for express delegation by the Attorney General." *Id.* The Ninth Circuit's holding thus is in direct conflict with the holding below that a delegation of authority could be implied by the RTC's supposed customary practice in permitting or impliedly ratifying repudiations by the Official. App. A, 13a.[14]

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[13] Other Circuits have also specifically agreed with the reasoning in *Emerson* that delegations of authority must be express and specific. In *United States v. Spain*, 825 F.2d 1426 (10th Cir. 1987), the Tenth Circuit also found that the Attorney General had not properly delegated his authority to schedule drugs temporarily to the Administrator of the DEA. In so ruling, the Tenth Circuit relied on the reasoning of *Emerson*, but also based its decision, in part, on its conclusion that such a sub-delegation could not be made at all given the requirements of the statute. The Supreme Court later ruled that such sub-delegation could be lawfully made, overruling that portion of *Spain*. *United States v. Touby*, 909 F.2d 759 (3d Cir. 1990), *aff'd*, 111 S. Ct. 1752 (1991). However, the Tenth Circuit later noted that this finding "does not alter the *Spain* court's conclusion that the initial temporary scheduling was invalid on procedural grounds." *United States v. Raymer*, 941 F.2d 1031, 1045 n.5 (10th Cir. 1991).

In *United States v. Touby*, the Third Circuit held that the new amendments to the regulations at issue in *Emerson* and *Spain* have effectively and explicitly delegated the temporary scheduling power to the DEA's Administrator. However, the Third Circuit was careful to note that "[u]nquestionably, [the Attorney General] must [delegate] explicitly in order for the subdelegee to act." 909 F.2d at 770. *Touby* was later affirmed by this Court on its various holdings concerning the lawfulness and constitutionality of the sub-delegations, although this Court did not address the need for express delegations.

Similarly, in *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976), the Ninth Circuit held that subdelegation to an agency subordinate could not be implied if delegation to the superior officer had been express and specific. Defendants appealed their conviction for trespassing on federal forest land that had been declared "closed" by a Forest Supervisor. The Ninth Circuit overturned these convictions because the Forest Supervisor had not been expressly delegated the authority to issue such orders.

To begin its analysis, the Ninth Circuit looked at the allegedly authorizing delegation in question, and, just like the Second Circuit here, determined that "[o]n its face, [the delegatory regulation] neither confirms nor denies the authority of a Forest Supervisor to issue closure orders." 535 F.2d at 1145. The Ninth Circuit then analyzed the other existing delegations and found that "only the most limited closure power has been [explicitly] delegated to Supervisors." *Id.* at 1152.

---

[14] The Ninth Circuit emphasized that the decision to schedule temporarily a drug requires neither public notice or comment nor input from related agencies, although permanent scheduling does. Thus, the Ninth Circuit considered the difference in the magnitude and gravity of an act when determining whether authority to take that act could be impliedly delegated. By contrast, here, the Second Circuit ignored the District Court's finding that the RTC's detailed delegations, which allowed the Official to enter into contracts with limited dollar values, did not extend to him the unfettered ability to repudiate a $2.9 billion bond issue. App. C, 37a.

Because there was a "detailed" scheme of delegation, the Ninth Circuit rejected the argument that the facially ambiguous "catch-all" regulation relied on by the government should be broadly construed. Instead, the Ninth Circuit held that the section relied on by the prosecution was merely "a grant of residual authority to assure that officials in the forest service bureaucracy can effectively perform their functions assigned to them." The Ninth Circuit concluded, "[a]bsent an explicit delegation from the Secretary, the boundaries of the Forest Supervisor's authority should not be extended into areas the regulations have clearly reserved for higher officials." *Id.* at 1152. Thus, the Ninth Circuit's decision in *Gemmill* is in direct conflict with both the Second Circuit's holding below and with its finding that a "catch-all" provision in the RTC's delegations could create an ambiguity as to the holder of the repudiation power. App. A, 11a.

Similarly, in *United States v. True*, 946 F.2d 682 (9th Cir. 1991), the Ninth Circuit again overturned a trespass conviction in a National Forest because a closure order had not been properly authorized. In *True*, the closure order in question had been properly issued but it implicated a large land area and contained the limiting proviso that "[c]losures will be moving, periodic and unscheduled. They will affect only a fraction of the above noted area and lands at any one time. They are effective only if the restriction is posted or you are so advised by a Forest Service Officer." 946 F.2d at 683.

The Ninth Circuit determined that this proviso to the closure order deprived the defendants of adequate notice that they were actually in a closed area at the time of their arrest. The government argued that this problem had been corrected, however, when the defendants were informed by Forest Service law enforcement officers that they were in a closed area. The Ninth Circuit held that such a contention would force the Court to construe "the regulations as permitting delegation of authority to subordinate officials to determine the time and place of closure orders." *Id.* at 686. Such a construction of the relevant regulations was impossible, however, because the regulations in question explicitly delegated the authority to issue closure orders to certain higher-ranking, specifically enumerated officials. (The regulation in question was an amendment of the regulation involved in *Gemmill*, now amended to give authority to issue closure orders to Forest Supervisors, but not law enforcement officers or rangers.) *Id.* at 689. The Ninth Circuit reaffirmed *Gemmill*'s holding that a delegation of the authority of a government official must be explicit. *Id.*

By contrast, the key to the Second Circuit's result-driven analysis below is disclosed in the opinion's final paragraph: "The interests of the public are at stake in this litigation. These interests should not be thwarted by what could be at most a technical procedural flaw." App. A, 14a. Presumably what the Court of Appeals had in mind was that the District Court's decision, if permitted to stand, might have cost the taxpayers more money than would a reversal (a surmise for which there was no evidence in the record).

We respectfully submit that the true public interest in this case is of a different and much more profound nature. Congress has created a wide variety of agencies with far-reaching powers over individual citizens. Citizens have a right to know that these powers will be exercised only in the manner, and by those persons, Congress intended and in accordance with clear and specific authorizations and procedures. The existence of and obedience to clear delegations of authority to agency officials are essential restraints on unbridled excesses by government agencies.

Thus, because the Court of Appeals' decision below is entirely inconsistent with the decisions of the other Circuit Courts of Appeals recognizing the importance of clear delegations of governmental powers, petitioners respectfully seek review by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

November 15, 1994

Respectfully submitted,

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APPENDIX

CONCLUSION

[illegible]

November 15, 1956

Respectfully submitted,

[illegible]

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 93 -7858

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,
Plaintiff-Appellee,

AND

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA,
Plaintiff-Intervenor-Appellee,

v.

RESOLUTION TRUST CORPORATION, as Conservator for
Franklin Savings Association,
Defendant-Appellant.

Argued: Feb. 22, 1994.
Decided: June 15, 1994.

Before: NEWMAN, Chief Judge, VAN GRAAFEILAND, Circuit Judge, and LASKER, District Judge.[1]

Appeal from a judgment of the United States District Court for the Southern District of New York (Leval, J.) holding defendant-appellant's purported repudiation of an indenture and the bonds issued thereunder to be unauthorized and void, and from a subsequent order of that court denying defendant-appellant's motion seeking relief from the judgment, amendment of the judgment, or a new trial. Judgment reversed and matter remanded.

MICHAEL A. COOPER, New York, NY
(Theodore Edelman, Diane D'Arcangelo, Scott L. Lessing, Sullivan & Cromwell, New York, NY, Elinor R. Hoffmann, Carolyn T. Ellis, Coudert Brothers, New York, NY, of counsel), *for Plaintiff-Appellee.*

MITCHELL A. KARLAN, New York, NY
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[1] United States District Judge for the Southern District of New York, sitting by designation.

VAN GRAAFEILAND, *Circuit Judge*:

Resolution Trust Corporation ("RTC"), as conservator for Franklin Savings Association, appeals from a judgment of the United States District Court for the Southern District of New York (Leval, J.) holding RTC's purported repudiation of an indenture and the bonds issued thereunder to be unauthorized, void and of no effect. *See* 803 F. Supp. 878. RTC also appeals from the district court's order denying post-judgment relief pursuant to Rules 60(b)(6), 52(b), and 59 of the Federal Rules of Civil Procedure. Because we conclude that RTC's repudiation was effective, we reverse the district court's judgment and remand for further proceedings.

On December 12, 1984, Franklin, a federally-insured stock savings and loan association, issued a series of zero coupon bonds with an aggregate face value of $2.9 billion, pursuant to an Indenture between Franklin and IBJ Schroder Bank & Trust Company as Trustee for the bondholders. The bonds were issued in three tranches with terms respectively of 30, 35 and 40 years. As provided in the Indenture, Franklin furnished the Trustee with collateral to secure payment of the bonds at maturity. The collateral, termed "Eligible Collateral," consisted of cash and certificates issued by the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association and the Government National Mortgage Association. The Indenture provided that, in an "Event of Default," the Trustee was to liquidate the Eligible Collateral and purchase U.S. Treasury securities and other similar government obligations, i.e., Eligible Zero Coupon Securities, in an amount sufficient to pay the principal amount of the outstanding bonds at their respective maturities. The Indenture provided further that the appointment of a conservator for Franklin would be an "Event of Default."

RTC, a wholly-owned government corporation, was created by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, 369, "to manage and dispose of the assets acquired from failed thrifts." H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 308 (1989), *reprinted* in 1989 U.S.C.C.A.N. 86, 104. A primary function of RTC is to act as the conservator or receiver for failed thrift institutions, operating "in a manner which . . . maximizes the net present value return from the sale or other disposition" of assets under its control. 12 U.S.C. § 1441a(b)(3)(C)(i). To assist RTC in its role, Congress has conferred on it certain extraordinary powers, including the right to repudiate contracts of the controlled institution that it determines to be burdensome, and whose repudiation would promote the institution's orderly administration. *See* 12 U.S.C. §§ 1441a(b)(4)(A), 1821(e)(1).

On February 16, 1990, the Office of Thrift Supervision ("OTS") appointed RTC as conservator for Franklin. Acting pursuant to authority granted it by the Indenture, section 1102(c), and by statute, 12 U.S.C. § 1821(e)(12), RTC instructed the Trustee not to pursue the Event-of-Default remedies available to it under the Indenture, and the Trustee refrained from so doing.

In the weeks that followed, representatives of RTC and the Trustee attempted to resolve some of the issues involving their respective rights, and on March 6, 1990, a "standstill agreement" respecting certain of these rights was reached. The Trustee agreed that it would not exercise any of its rights under the Indenture without first giving RTC fifteen days' written notice. RTC agreed in turn that it would not disaffirm or repudiate the Indenture or the bonds without having given ten days' prior notice to the Trustee.

The Indenture also obligated the Trustee to liquidate the Eligible Collateral and purchase the Eligible Zero Coupon Securities if Franklin submitted a report to the OTS disclosing that it had failed to meet certain regulatory net worth or capital requirements. If within ninety days after the filing of such a report Franklin failed to report to OTS that it again was in compliance with regulatory net worth or capital requirements, the Trustee was obligated to "defease" the bonds by transferring the U.S. Treasury securities and other government obligations to defeasance trusts held by the Trustee for the benefit of the bondholders.

On April 10, 1990, RTC, as conservator for Franklin, submitted a form to OTS indicating that Franklin was not in compliance with regulatory minimum capital requirements. This triggered the Trustee's obligation to liquidate the Eligible Collateral. Aware that RTC might exercise its statutory power to repudiate the bonds and the Indenture, the Trustee filed a complaint in the United States District Court for the Southern District of New York on April 24, 1990 seeking, among other things, a declaration that the Trustee was both entitled and obligated to pursue remedies available under the Indenture.

Although RTC was aware of its right under 12 U.S.C. §§ 1441a(b)(4)(A) and 1821(e)(1) to repudiate or disaffirm the bonds at issue, it did not immediately do so. Instead, on April 10, 1990, its Board of Directors adopted a policy accompanied by a news release stating that it would repudiate or disaffirm direct collateralized borrowings, such as the bonds, within sixty days. Thereafter, on May 30, 1990, RTC notified the Trustee that it intended to disaffirm and repudiate the Indenture and the bonds on June 9, 1990 (60 days after the April 10th notice). In a letter that accompanied the notice of intent, Michael Tucci, RTC's Senior Counsel, stated that RTC reserved the right to reconsider its position and ultimately might decide not to repudiate. However, on June 8, 1990, Senior Counsel Tucci sent the Trustee a letter which read in pertinent part as follows:

> Pursuant to its authority under Section 11(e) of the Federal Deposit Insurance Act, as amended by Section 212 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), made applicable to the RTC under Section 501 of FIRREA, the Conservator hereby disaffirms and repudiates the Indenture and the Bonds issued thereunder, effective June 9, 1990.
>
> The Conservator will be in contact with you to discuss all matters relating to the repudiation of the Indenture and Bonds, including procedures for payment of the Bonds and the orderly return of the Eligible Collateral to the Conservator. For

> your information, a copy of the RTC's April 10, 1990 Policy Statement regarding such matters is attached.
>
> You are requested to immediately notify the Bondholders, in the manner provided in the Indenture, of the repudiation of the Indenture and Bonds, and to confirm such notice to the undersigned.
>
> You are again directed to refrain from taking any actions pursuant to Sections 604, 607, 1102, and 1301 of the Indenture. The Conservator will hold you strictly responsible for any losses or damages incurred by the Conservator or any other adverse financial effects arising out of or as a result of any such action taken by you without the prior written consent of the Conservator.

A similar letter was sent to Security Bank of Kansas City, custodian of the Eligible Collateral. It read in part:

> This letter is to inform you that effective June 9, 1990, the Resolution Trust Corporation ("RTC") as conservator of Franklin (the "Conservator") has disaffirmed and repudiated the Indenture and the Bonds issued thereunder. Attached hereto is a letter dated June 8, 1990, from the Conservator notifying the Trustee of this action.

On July 25, 1990, RTC informed the Trustee by letter that on August 8, 1990, it would tender to the Trustee the accreted value of the bonds, i.e., $124,626,640.24. At the same time, it issued a news release concerning the payment which stated in part:

> The Resolution Trust Corporation (RTC) today announced August 8, 1990, as the payment date for $2.9 billion in zero coupon bonds from Franklin Savings Association, Ottawa, Kansas.
>
> The GNMA/FHLMC/FNMA-Secured bonds, series A, due 2014, 2019, and 2024, had been disaffirmed by the RTC and repudiated on June 9, 1990.

On July 9, 1990, RTC filed its answer to the Trustee's amended complaint in the April 24th action with a counterclaim against the Trustee, and a third-party complaint against Security Bank of Kansas City, the holder of the excess collateral, in which RTC repeatedly alleged that it had repudiated the Indenture and bonds on June 9, 1990.

Following a "trial" consisting largely of written submissions, see 803 F. Supp. at 879, the district court correctly noted that section 1821(e)(1) empowered RTC as conservator to repudiate the bonds if, in RTC's discretion, the performance of the bonded obligation was determined to be burdensome and the repudiation of which would promote the orderly administration of Franklin's affairs. *Id.* at 882. It then held that RTC had satisfied the requirements of the statute, i.e., that "RTC has satisfactorily demonstrated that it made the required determinations." *Id.* at 883. The district court then pointed out in some detail that the determinations actually were made by William Roelle, RTC's Director of Resolutions and Operations, after consultation with in-house counsel Michael Tucci; and that Roelle made the appropriate determinations concerning burdensomeness and the promotion of orderly administration of Franklin's affairs. *Id.* at 883-84. The district court also held that the repudiation decision was not void as arbitrary or capricious in that RTC acted lawfully within its discretion in its assessment of burdensomeness and the promotion of orderly administration. *Id.* at 884. The district court held further that the act of repudiation was not untimely, stating that "the delay was in large measure occasioned by the RTC's worry that if the RTC conservancy should be set aside in a pending court challenge, the benefits resulting from repudiation, which the RTC intended for depositors and taxpayers, might have redounded to the windfall profit of the shareholders of Franklin at the expense of the Bondholders." *Id.*

If, as the district court thus implicitly held, Roelle, as Director of Resolutions and Operations, could act on behalf of RTC in making the determinations concerning burdensomeness and the orderly administration of Franklin's affairs, the determinations that RTC was required by statute to make, it would appear that Roelle also had the authority to act on behalf of RTC in giving effect to his determinations. The district court held, however, that because RTC's bylaws and delegation of power contained no express grant of such authority, it did not exist. We disagree.

Under the heading "Powers of the Board of Directors," RTC's bylaws read as follows:

> The management of the Corporation shall be vested in the Board of Directors, which shall have all powers specifically granted by the provisions of Title V of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and other laws of the United States and such incidental powers as shall be necessary to carry out the powers so granted. Within the limitations of the law, the Board of Directors may delegate any of its specific or incidental powers to any standing or special committee of the Corporation or to any officer or agent of the Corporation upon such terms and conditions as it shall prescribe, except the power to amend these Bylaws or to adopt new Bylaws.

Pursuant to this grant of authority, the Board of Directors, after specifying certain powers delegated to the Director of Resolutions and Operations, empowered him

> [t]o do such other things necessary to carry on a savings association's business and to conserve and preserve a savings association's assets and property . . .; *provided*, . . . no actions taken pursuant to this paragraph shall exceed the authority delegated pursuant to any other Section of these Delegations of Authority . . . .

As appears from the foregoing, neither the bylaw nor the delegation of power thereunder contains a specific reference to repudiation. Assuming that such lack of specificity demonstrates ambiguity, resort to a time-tested method of resolving such ambiguity clearly is called for. It is well established that "[t]he rules of contract interpretation are generally applicable to the interpretation of bylaws." 8 *Fletcher Cyc. Corp.* § 4195 (rev. 1982). For over a century, courts have looked to the conduct of the parties in resolving ambiguities in contractual language. In *Brooklyn Life Ins. Co. v. Dutcher*, 95 U.S. 269, 273(1877), the Court said:

> The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done.

In *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118 (1913), the Court said:

> Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.

This Court has, of course, followed suit. *See Croce v. Kurnit*, 737 F.2d 229, 235 (2d Cir. 1984); *In re Schuman Sons Jewelers, Inc.*, 90 F.2d 606, 607 (2d Cir. 1937). *See also 4 Williston on Contracts* 3d ed. § 623

("An important aid in the interpretation of contracts is the practical construction placed on the agreement by the parties themselves."); *Restatement (Second) of Contracts* § 202, cmt. g ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning."). In 18 C.J.S. Corporations § 116, the law with reference to corporate bylaws is summed up as follows:

> The board of directors of a corporation may interpret an ambiguous by-law without formality, the interpretation arising from their conduct and methods of transacting business, and the general rule as to recognizing a practical construction by the parties applies, so that, in the case of ambiguity in a by-law, a court will not give it a positive construction opposed to any consistent practical construction which it has received from the corporation and its members, where such practical construction is not unreasonable, or contrary to the principles of justice or morality or to any rule of law or public policy. (Footnote citations omitted.)

In the light of the above-described chronology of the events that preceded the judgment below, we are convinced that the RTC Board of Directors knew and fully approved of Roelle's exercise of the power of repudiation. In the lawsuit brought by the Trustee on April 24, 1990, RTC made its position clear with regard to the repudiation by Roelle when it stated repeatedly (32 times) in its answer and third-party complaint that it had repudiated the Indenture and bonds on June 9, 1990.

This repudiation, in accordance with RTC's customary practice, was effected by Roelle. We hold that RTC's bylaws and delegation of power thereunder, as interpreted and applied by its Board, authorized Roelle to make the repudiation decision at issue herein.

Because we so hold, we need not consider the merits of the district court's rejection of RTC's post-judgment formal ratification of Roelle's acts. We note only that, proof of the formal ratification aside, there was strong evidence of prejudgment ratification which could have been relied upon by the district court had it been timely argued by RTC. We therefore feel it incumbent to make a few observations on the point. *See Union Pacific R. Co. v. Chicago, Rock Island & Pacific R. Co.*, 163 U.S. 564, 593, (1896). In the seminal case of *Robb v. Vos*, 155 U.S. 13, 43 (1894), the Court said that "one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act." This rule applies with equal force where the affirmative allegations are made by the defendant. In *Robb*, for example, the persons who were held to have ratified an unauthorized act were defendants and cross-petitioners. RTC's allegation of proper repudiation, repeated thirty-two times in its answer and cross-complaint, must be recognized as strong evidence of ratification. *See also Gross v. Regor Finance Co.*, 96 F.2d 37, 38 (5th Cir. 1938); *Wolfe v. Shell Petroleum Corp.*, 83 F.2d 438, 443 (10th Cir.), *cert. denied*, 299 U.S. 553 (1936). Ratification also may be found to exist by implication from a principal's failure to dissent within a reasonable time after learning what had been done. "If a corporation acquires or is charged with knowledge of an unauthorized act undertaken by someone on its behalf, and does not repudiate that act within a reasonable time, but instead acquiesces in it, the corporation is bound by the act." *In re Martin-Trigona*, 760 F.2d 1334, 1341 (2d Cir. 1985). *See also Law v. Cross*, 66 U.S. 533, 539-40 (1862); *Leviten v. Bidkley, Mandeville & Wimple, Inc.*, 35 F.2d 825, 827 (2d Cir. 1929); *Restatement (Second) of Agency* § 97.

The interests of the public are at stake in this litigation. These interests should not be thwarted by what could be at most a technical procedural flaw. The judgment of the district court dated October 21, 1992 is reversed and the matter is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 93 -7858

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of August one thousand nine hundred and ninety-four.

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,
Plaintiff-Appellee,

AND

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA,
Plaintiff-Intervenor-Appellee,

V.

RESOLUTION TRUST CORPORATION, as Conservator for Franklin Savings Association,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellee Employees' Retirement System of Alabama.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is denied.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: /S/
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 90 - 2736 (PNL)

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,
Plaintiff,

and

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA, et al.,
Plaintiff-Intervenors,

v.

RESOLUTION TRUST CORPORATION, as Conservator for
Franklin Savings Association,
Defendant.

OPINION AND ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dated: October 13, 1992

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PIERRE N. LEVAL, *U.S.D.J.*

This case challenges the repudiation by the Resolution Trust Fund Corporation ("RTC"), as conservator of Franklin Savings Association ("Franklin"), of an indenture and bonds issued thereunder by Franklin. Plaintiff IBJ Schroder is the indenture trustee (the "Trustee") for the bondholders. The Trustee, joined by plaintiff-intervenor-bondholders (the "Bondholders"),[1] allege that (1) the RTC's repudiation of the indenture and the bonds is void as inconsistent with the standards of the governing statute, and unauthorized by RTC, (2) repudiation violates the Fifth Amendment substantive due process, procedural due process and takings clauses, and (3) in the event that the indenture and the bonds were lawfully repudiated, the damages to which the Bondholders are entitled differs from that offered by RTC. The Trustee also seeks an award of fees and expenses due under the indenture, including counsel fees incurred in this litigation.

---

[1] The Trustee and the Bondholders are sometimes referred to collectively as "Plaintiffs."

Initially, the parties made cross-motions for summary judgment. The parties then withdrew the motions for summary judgment and instead stipulated to the submission of a written record for final trial on the merits.

Background

On December 1, 1984, pursuant to a bond indenture (the "Indenture") between Franklin and Schroder as trustee for the bondholders, Franklin issued a series of bonds in the aggregate principal amount due on maturity of $2.9 billion (the "Bonds"). The Bonds are zero coupon bonds. This means that the issuer does not pay interest at any time prior to maturity; the only payment made by the issuer is the payment at maturity of the principal amount; thus the interest obligation incurred by the issuer is a function of the discount from face amount at which the Bonds were initially sold. When this discount is factored by the period of time from subscription to maturity, it can be expressed in terms of "yield-to-maturity." The payment of the principal amount at maturity will represent the reimbursement of the amount borrowed through the subscription at the time of issuance, plus a single payment representing all interest obligation accrued through the life of the Bonds.

The Bonds were issued in three series with terms of 30, 35, and 40 years, and thus come due on December 12, 2014, December 12, 2019 and December 12, 2024. The yield to maturity for these three maturity dates based on the subscription prices is respectively 11.75%, 11.375% and 11%.

Since the initial offering, the Bonds have been traded in the secondary markets. Among the holders of the Bonds, some purchased at the initial offering and some purchased in the secondary bond market thereafter at whatever prices prevailed from time to time. For a purchaser in the secondary bond market who buys at any point during the life of the bond, his interest expectation is a function of the difference between the price at which the purchase is made and the expected payment of stated value at maturity, factored by the period of time between his purchase and maturity.

The intervening Bondholders are state pension funds, insurance companies, and investment advisors. They own in the aggregate over 70% of the Bonds. They purchased their bonds in open secondary market transactions rather than at the initial offering.

Pursuant to the Indenture, the Bonds are secured by collateral furnished to the Trustee by Franklin consisting of cash and certificates issued by Federal Home Loan Mortgage Corporation, the Federal National Mortgage Corporation and the Government National Mortgage Association (the "Eligible Collateral"). The Indenture provides that the Trustee holds a first perfected security interest in the Eligible Collateral, for the benefit of all bondholders, in order to secure the payment of the Bonds at maturity. The Trustee also holds a junior security interest in the Eligible Collateral to secure payment for its services.

Because the value of the Eligible Collateral varies with the rise and fall of interest rates, the Trustee is required by the Indenture to value the Eligible Collateral each week to ensure that it is at least equal to the "Required Collateral Coverage." "Required Collateral Coverage" is defined as an amount of Eligible Collateral such that the sum of the market value of the Eligible Collateral (discounted by approximately 30%) equals the "Collateral Base." The "Collateral Base" is defined as the purchase price of "Eligible Zero Coupon Securities" sufficient to pay the principal amount of the outstanding bonds at their respective maturities. "Eligible Zero Coupon Securities" are defined as U.S. Treasury securities and similar obligations of agencies and instrumentalities of the United States.[2]

The Indenture specifies remedies designed to guarantee that the Bonds will be paid in full at their maturities even if the financial status of Franklin deteriorates. Among these are the remedies specified in Section 604 of the Indenture. The Trustee pursues the Section 604 remedies upon the happening of certain triggering events such as Franklin's failure to demonstrate its financial health in regulatory filings with the United States Office of Thrift Supervision ("OTS").[3] If Franklin submits a report to OTS disclosing that it fails to meet regulatory net worth requirements, the Trustee is obligated to liquidate the Eligible Collateral and to purchase Eligible Zero Coupon Securities in an amount sufficient to pay the principal amount of the outstanding bonds at their respective maturities. If after the expiration of 90 days Franklin fails to submit another regulatory report to OTS stating that it is in compliance with regulatory capital requirements, the Trustee is obligated to "defease" the Bonds. To effectuate defeasance, the Eligible Zero Coupon Securities are transferred to Defeasance Trusts held by the Trustee for the benefit of the Bondholders. Simultaneously, all substantial rights and obligations of Franklin under the Bonds and the Indenture terminate.

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[2] The market value of the Eligible Collateral is discounted to ensure that the Bonds are always over-collateralized.

[3] Similar remedies are specified in Sections 1101 and 1102 of the Indenture with respect to "Events of Default" prior to maturity, such as Franklin being placed into conservatorship or receivership. Although Franklin was put into conservatorship, default and concomitant remedies have not been put at issue here by the Trustee or RTC because (1) events of default give the Trustee some discretion about how to proceed (whereas the filing of a bad report with OTS does not); (2) if the remedial provisions are triggered by

On February 16, 1990, OTS effectively terminated Franklin's status as a private institution by appointing RTC as Conservator of Franklin. Although the appointment of a conservator is an event constituting a default under the Indenture, the Indenture provides that the Trustee shall not pursue remedies available in

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a default, the conservator may ask the Trustee not to pursue the remedial provisions (whereas no similar right is given to the conservator in the instance where a bad report has been filed with OTS). In the instant case, RTC as conservator specifically instructed the Trustee to refrain from pursuing the remedies available in the event of a default. *See infra.*

Intervenors, however, contend that the Trustee is obligated to sell the Eligible Collateral and defease the Bonds under the remedies triggered by Events of Default. Whether Intervenors are correct in this contention is academic because all parties agree that if the Indenture is in effect, events have occurred which would trigger the remedial provisions.

the event of a default if that remedy has been objected to in writing by the conservator. By letter, RTC specifically instructed the Trustee not to pursue any remedies available to the Trustee under the Indenture in the event of a default (such as the appointment of a conservator).

In the letter, the RTC also took the position that it had the right as conservator to object to any exercise by the Trustee of the Section 604 collateral exchange and defeasance provisions that would be in effect should Franklin report its failure to meet minimum regulatory capital requirements to OTS. Accordingly, RTC advised the Trustee that it objected to the Trustee exercising Section 604 rights in the event that the conservator submitted regulatory reports to the OTS evidencing Franklin's failure to meet minimum capital requirements. RTC also advised the Trustee that the RTC would hold the Trustee strictly liable for any losses or damages incurred by Trustee as a result of the Trustee for taking any action objected to by RTC.

Among the powers available to the RTC under the FIRREA statute is the power to repudiate or disaffirm contracts of an institution under receivership or conservatorship. 12 U.S.C. § 1821(e)(1). From the time of its appointment as conservator, the RTC entertained the prospect of repudiating the Bonds. The RTC believed that by repudiating the Bonds it could save very large amounts (approximately $200 million) for the institution and could immediately obtain from the Trustee large amounts otherwise required to be held by the Trustee as Eligible Collateral securing the performance of the Bonds. The RTC decided, however, to delay repudiation primarily because of a lawsuit challenging the lawfulness of the conservatorship; the RTC reasoned that if its conservatorship were terminated by a court and the institution were returned to its powers, prior repudiation could bring the owners gigantic windfall profits resulting from the disaffirmance.

Several times during February and early March of 1990, RTC conferred with certain Bondholders regarding the future of the Bonds and the Indenture, but the parties reached no resolution. On March 6, 1990, RTC and the Trustee entered into a Standstill Agreement under which, among other things, RTC agreed that it would not demand the return of the Eligible Collateral without giving the Trustee 15-day prior written notice. RTC further agreed that it would not disaffirm or repudiate the Bonds or Indenture without giving 10 days' prior written notice to the Trustee.

On April 10, 1990, Franklin, through its conservator the RTC, filed a Form 8-K with the OTS disclosing that it was not in compliance with the regulatory minimum capital requirements promulgated by the OTS pursuant to FIRREA. By the terms of the Indenture, this event triggered the Trustee's obligation to liquidate the Eligible Collateral and purchase Eligible Zero Coupon Securities pursuant to Section 604 of the Indenture.[4]

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[4] Similarly, RTC's failure to submit an additional report to OTS within 90 days indicating Franklin's compliance with minimum regulatory capital requirements triggered the Trustee's obligation to defease the Bonds and establish the Defeasance Trusts.

On April 10, 1990, the RTC announced a Statement of Policy concerning the repudiation of collateralized borrowings of institutions that had come under its conservatorship. The Statement announced that repudiations would occur within 60 days after the RTC's appointment, failing which the terms of the contract would be enforceable throughout the term of the receivership. As to damages payable by the RTC upon repudiation, the Statement announced that they would be limited to principal owed plus contract rate of interest, or (in the case of zero coupon bonds) "accreted interest" to the date of redemption.

On May 30, 1990, the RTC notified the Trustee that RTC intended to repudiate and disaffirm the Indenture and the Bonds on June 9, 1990, and to demand the return of the Eligible Collateral on or after June 14, 1990. The RTC reserved the right to change its mind.

On June 8, 1990, the Trustee received notice from the RTC that the RTC had disaffirmed and repudiated the Bonds and the Indenture pursuant to 12 U.S.C. § 1821(e)(1). The Trustee was directed to refrain from taking any action pursuant to the remedial provisions of the Indenture.

On July 25, 1990, RTC issued a payment notice establishing August 8 as the payment day for the Bonds. The notice stated that no additional increment of accrued value would be recognized after the payment date.

On December 14, 1990, counsel for RTC received a letter dated December 11, 1990 from the

Trustee stating that the Trustee had withdrawn $630,000 in funds from Eligible Collateral held by the Trustee in order to pay fees and expenses purportedly incurred under the Indenture. RTC moved for a preliminary injunction requiring the Trustee to return those funds. The motion was denied.

Issues of Law
Overview

The statutory law governing the dispute is contained in Section 212(e) of FIRREA, codified at 12 U.S.C. § 1821(e), which defines the rights and obligations of the RTC in its capacity as conservator or receiver for a financial institution, with respect to contracts entered into by the institution prior to the appointment of the conservator or receiver.

The RTC's right of repudiation is established by § 1821(e)(1), which provides that the RTC, as conservator or receiver for an insolvent institution,

> may disaffirm or repudiate any contract or lease — (A) to which such institution is a party; (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1). Second, § 1821(e)(3) provides that RTC's liability for repudiating a contract pursuant to § 1821(e)(1),

> (A) . . . shall be (i) limited to actual direct compensatory damages; and (ii) determined as of (I) the date of the appointment of the conservator or receiver; or (II) in the case of [qualified financial contracts] the date of the disaffirmance or repudiation of such contract or agreement.
>
> (B) For the purposes of subparagraph (A), the term "actual direct compensatory damages" does not include (i) punitive or exemplary damages; (ii) damages for lost profits or opportunity; or (iii) damages for pain and suffering.

12 U.S.C. § 1821(e)(3). Finally, § 1821(e)(11) of FIRREA provides that as regards "security interests,"

> No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such interest is taken in contemplation of the institution's insolvency or with the intent of hinder, delay, or defraud the institution or the creditors of such institution.

12 U.S.C. § 1821(e)(11).

Several questions arise under those statutes:

Plaintiffs first contest the lawfulness of the RTC's repudiation on several grounds. Plaintiffs assert that the RTC did not determine, in accordance with the preconditions required by § 1821(e)(1)(B) and (C), that the performance of the Indenture contract would be "burdensome" to the institution, or that repudiation "[would] promote the orderly administration of the institution's affairs." In addition, plaintiffs question whether the performance was in fact burdensome.

Further, plaintiffs contest whether prohibition of § 1821(e)(11) against "the avoidance of any . . . security interest in any of the assets of the . . . institution" prohibits the repudiation of these secured Bonds.

Finally, in the event it is determined the RTC did lawfully repudiate, the parties dispute the proper computation of "actual direct compensatory damages . . . not includ[ing] . . . ." damages for lost profits or opportunity, as provided by § 1821(e)(3).

* * *

The initial challenge focuses on the lawfulness of the RTC's exercise of its power of repudiation. First, the Trustee and Bondholders contend that the RTC repudiated without having made the determinations required by the statute: that the performance of the Bonds' obligations would be "burdensome" and that repudiation would "promote the orderly administration of the institution's affairs." Second, they contend that, even if these determinations were made, it was an abuse of discretion on RTC's part to so determine. Third, they contend the repudiation was void because it was not made within a reasonable time, as required by the

FIRREA statute. Fourth, they contend the repudiation was void because the RTC official who purported to take the action lacked authority to take such action on the RTC's behalf.

1. *Whether the RTC made the required determinations.* As to the first challenge, I find that the RTC has satisfactorily demonstrated that it made the required determinations. The repudiation decision was made on June 8, 1990 by William Roelle, the RTC's Director of Resolutions and Operations, after consultation with in-house counsel Michael Tucci. The decision was provoked by a Memorandum addressed to Roelle and Tucci on May 24, 1990, by John L. Carr, Managing Agent, and L. Stephen Garlow, Managing Attorney of the Franklin. This memorandum warned that in order to comply with the April 10 Policy Statement, providing that the RTC would make its repudiation decisions within 60 days, the repudiation decision needed to be made by June 8. The memorandum went on to argue in eight single-spaced typewritten pages that the Bonds were burdensome to the institution and that their repudiation would promote the orderly administration of Franklin's affairs. In general, the hypothesis of the memorandum was that repudiation would permit RTC to liquidate the Bonds at accreted value and recapture some $180 million in collateral being held by the Trustee as security for full performance. Tucci discussed this memorandum with Roelle. Tucci knew on the basis of prior discussions with Roelle that Roelle was familiar with the issues raised by the Carr memorandum. In fact, repudiation of the Franklin Bonds had been under consideration ever since RTC had assumed the conservatorship in February, and delayed, as noted above, primarily to

avoid the risk of creating windfall profits for Franklin's stockholders if the conservatorship were terminated by a court. Roelle announced the repudiation on June 8, the last possible day.

No written memorandum was made of Roelle's determination that the Bonds were burdensome and that their repudiation would promote orderly administration. What's more, the Bondholders point out, Roelle's deposition and an earlier memo that he authored could support the conclusion that Roelle believed *burdensomeness* was the only required determination. They argue accordingly that Roelle never considered the question of promoting the orderly administration of the institution's affairs. I do not accept the Bondholders' argument. Although it would certainly be a more prudent and preferable procedure for the RTC to memorialize such determinations and actions by a formal written statement asserting that the required considerations had been met, the issuance of such a statement of the determinations made is not a requirement of law. Given that Carr's memorandum to Roelle advocating repudiation expressly discussed the required statutory points and that Tucci thereafter discussed the question with Roelle, who in any event was familiar with the issue based on earlier discussion, I cannot accept the Bondholders' argument that Roelle made his decision to repudiate without making the necessary determinations on burdensomeness and on the promotion of the orderly administration of the Franklin's affairs.

2. *Whether repudiation was arbitrary and capricious.* Nor do I accept the Bondholders' contention that the repudiation decision was void as

arbitrary and capricious because it was not based on a thorough study of the alternatives or a correct understanding of the legal consequences. The Bondholders assert that the RTC was acting on a mistaken understanding of the law in its assumption that upon repudiation it could redeem at accreted value. They point out in addition that the RTC failed to make a thorough study comparing the consequences of defeasance by the Trustee with repudiation by the RTC. It may be, as the Bondholders contend, that the RTC was acting on an incorrect understanding of the legal consequences of repudiation. But it does not follow that the RTC's action was void for abuse of discretion. The statute makes a point of according wide discretionary authority to the RTC in its assessment of burdensomeness and the promotion of orderly administration. I find that the RTC acted lawfully, within that discretion, even if it should turn out that the determinations were based on an incorrect perception of the legal consequences of the act.

3. *Whether repudiation was untimely.* I also reject the Bondholders' contention that the act of repudiation was untimely under the FIRREA statute. Under Section 1821(e)(2), repudiation must be done "within a reasonable period." Construing this restriction, the RTC issued a Policy Statement on April 10, 1990, that repudiations would be done within 60 days of the RTC's appointment. In this case, the repudiation did not occur for nearly four months after RTC's appointment. The 60-day policy, however, had not yet been adopted at the time of the RTC's appointment. The repudiation was declared on the sixtieth day following the promulgation of the 60-day policy. I find no reason to accept the Bondholders'

argument that a four-month delay from appointment was unreasonable. The Bondholders do not show that they were harmed in any way by the delay. Although it was technically inconsistent with the policy RTC adopted in that it came more than 60 days after RTC's appointment, that does not necessarily render it illegal or untimely. Furthermore, the policy is reasonably construed to allow 60 days from the policy statement in cases where the appointment preceded the adoption of the policy, at least absent a showing of unreasonableness on the merits.

The Bondholders argue further that the delay was incurred by reason of an impermissible consideration. As noted above, the delay was in large measure occasioned by the RTC's worry that if the RTC conservancy should be set aside in a pending court challenge, the benefits resulting from repudiation, which the RTC intended for depositors and taxpayers, might have redounded to the windfall profit of the shareholders of Franklin at the expense of the Bondholders. The Bondholders contend that the law does not contemplate delay for such a reason and that the delay must therefore be considered unreasonable and unlawful. I find no basis for this contention. It seems perfectly reasonable for the RTC to have worried that the repudiation might result in unintended (and unfair) consequences if the challenge to the RTC's appointment as conservator should succeed. I find the repudiation was done within a reasonable period as the statute requires.

4. *Whether Roelle lacked authority to repudiate.* The Bondholders' fourth contention is that William Roelle, the Director of Resolutions and Operations for

the RTC, was not empowered by the RTC's standards of governance to repudiate obligations of this magnitude. It is undisputed that Roelle alone made the determination to repudiate and that it was neither approved in advance nor subsequently ratified by the Board or by the Chairman.

The Bondholders' contention is not frivolous. In fact, the RTC has no persuasive answer to it.

The governing statute, 12 U.S.C. § 1441a(b)(10)(J), provides that the RTC shall "prescribe through its Board of Directors bylaws that shall be consistent with law." The Board of Directors adopted bylaws for the RTC on August 9, 1989. Art. IV, Section 5 of the bylaws vests in the Board "the management of the Corporation" as well as "all the powers specifically granted by" FIRREA and other laws of the United States "and such incidental powers as shall be necessary to carry out the powers so granted." This section goes on to authorize the Board to "delegate any of its specific or incidental powers to any . . . committee . . . or to any officer or agent of the Corporation." Art. VII provides for the Officers. They are named in Section 1, and Section 2 provides that the "officers of the Corporation shall have such powers and shall perform such duties as the Chairperson or the Board of Directors may from time to time prescribe." On October 24, 1989, the Board of Directors approved delegations of authority for certain committees and officers of the RTC. The document is extremely detailed and consumes over 60 single-spaced, typed pages. Chapter IV of this document covers the "Delegations of Authority to the Executive Director and to the Director of the Resolutions and Operations

Division," the latter being the officer (William Roelle) who made the repudiation decision. The delegations to these two high officers are highly specific and consume 18 pages, divided into two categories of Asset Authority and Operational Authority. Many of the delegations of authority carry limits of monetary amount (such as A(2) which provides authority to sell assets having an appraised value up to $50 million). The introductory language specifies as to authorizations carrying stated monetary limits that they are expected to be exercised only in the event that the pertinent "RTC Committee is unable to convene and the Executive Director is absent and the decision requires immediate action."

Nowhere among these extensive detailed delegations to the Director of Resolutions and Operations is there one relating to the repudiation of contracts, much less involving the very large amounts of money at issue in this instance.

RTC offers several ineffectual answers: First, dealing with the text of the delegations to Roelle's office, it cites the delegation numbered B(14), which confers the power "[t]o execute powers of attorney on behalf of the Corporation, as conservator, receiver, or in its corporate capacity, for the purpose of granting such powers as may be convenient in the disposition of assets acquired or controlled by the Corporation *or for the exercise of all the powers conferred upon the Corporation as receiver. . . .*" (emphasis added). Through a combination of hyper-literal reading and loose interpretation, the RTC contends that this delegated power authorizes Roelle to repudiate the Bonds. Read literally, RTC argues, it authorizes Roelle to execute a power of attorney in favor of another person granting all the powers of the Corporation as receiver. Then shifting to a loose interpretation, the RTC reasons that Roelle cannot logically be empowered to delegate authority which he does not himself possess; thus he must be empowered himself to exercise all the powers of the Corporation, including repudiation without limit.

This reading makes nonsense of the elaborately crafted and carefully circumscribed delegations to Roelle's office. If it were true that this authorization conferred all the powers of the RTC as receiver, then the remainder of the 18 pages of more narrowly tailored authorizations would be reduced to a nullity. All would be subsumed in the broader, indeed global, power. It is perfectly clear in the context that, although inartfully drafted, this authorization is intended to permit the Director of the Resolutions and Operations Division to delegate any of the powers *he or she* possesses, and not to expand the power of that office to include all the powers of the RTC.

The RTC contends that because Roelle was in charge of all conservancy operations, he must have been authorized to order repudiations. Perhaps it would have been wise of the Board to confer that power on him. Perhaps the Board would have done so had it thought of the question. But the simple fact is, it did not do so. Furthermore, the delegations that were in fact conferred do not support the contention that the Board intended to confer such unlimited authority on Roelle's office. For the delegations actually conferred are full of restrictions at monetary amounts far below what would be involved in the repudiation of a $2.9 billion bond issue.

The RTC then argues that if the Director of Resolutions and Operations does not possess this power, this means that the Board of Directors must be importuned with many small issues affecting individual contract repudiations which it does not have time to deal with. There is no merit to the argument. First of all, the repudiation of a $2.9 billion bond issue is not a trifle. Second, if the Board wishes to delegate the authority to deal with such matters, it need only do so. Third, the inquiry here undertaken has been only to ascertain whether there had been a delegation of such authority *to the Director of Resolutions and Operations*, as he was the officer who acted to repudiate in this instance. The fact that no such authority was found does not necessarily mean that no such delegation was made to any other officer of committee of the Corporation. What has been established here is only that the officer who purported to repudiate on behalf of the RTC had not received a delegation of power to do so from the Board.

I conclude that the RTC did not effectively repudiate Franklin's zero coupon bonds. The fact that an unauthorized official of RTC purported to repudiate on RTC's behalf did not constitute a legally effective repudiation by the RTC.

* * *

My resolution of this issue moots the Trustee's and Bondholders' other challenges to the actions of the RTC. I accordingly need not resolve whether the purported repudiation violated the prohibition against avoiding security interests or whether the RTC employed the correct measure of damages as compensation for the repudiated bonds.

The court finds for the reasons stated above that the action of the RTC's Director of Resolutions and Operations of June 8, 1990, purporting to repudiate the Franklin zero coupon bond issue, did not effectively repudiate because that officer was not authorized under the RTC's charter by-laws and governing statute to take such action on the RTC's behalf.

Conclusion

Judgment is granted to the Plaintiff-Trustee and the Bondholders.

Date: New York, NY
October 13, 1992

SO ORDERED

/S/
PIERRE N. LEVAL, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 90 -2736 (PNL)

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,
Plaintiff,

and

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA, et al.,
Plaintiff-Intervenors,

v.

RESOLUTION TRUST CORPORATION, as Conservator for
Franklin Savings Association,
Defendant.

JUDGMENT

IN ACCORDANCE WITH THE PLEADINGS SUBMITTED BY THE PARTIES, THE RECORD OF THIS CASE, AND THIS COURT'S OPINION #7016 OF OCTOBER 14, 1992, JUDGMENT IS GRANTED TO THE PLAINTIFF AND PLAINTIFFS-INTERVENORS, AND THE DEFENDANT'S COUNTERCLAIM IS HEREBY DISMISSED WITH PREJUDICE. IT IS FURTHER ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendant's purported repudiations on June 8, 1990 of the Indenture dated as of December 1, 1984 and zero coupon bonds issued thereunder were unauthorized, null, void and of no effect.

2. Plaintiff and Plaintiffs-Intervenors are awarded costs of suit to the extent permitted by law.

Date: New York, NY
October 20, 1992

SO ORDERED

/S/

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 90 -2736 (PNL)

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,
Plaintiff,

and

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA, et al.,
Plaintiff-Intervenors,

v.

RESOLUTION TRUST CORPORATION, as Conservator for Franklin Savings Association,
Defendant.

Dated: July 22, 1993

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OPINION AND ORDER

PIERRE N. LEVAL, *U.S.D.J.*

The Resolution Trust Corporation ("RTC"), in its capacity as conservator of Franklin Savings Association ("Franklin"), moves for relief from, or to amend, this court's judgment of October 20, 1992, to reopen the case and make new finds of fact and conclusions of law, or, in the alternative, for a new trial.

Background

The background of this case is set out in considerable detail in my Opinion and Order of October 13, 1992, familiarity with which is assumed. *See IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.*, 803 F. Supp. 878 (S.D.N.Y. 1992). The case arises from the purported repudiation by the RTC, in its capacity as conservator of Franklin, of an indenture and bonds issued thereunder.

On December 1, 1984, pursuant to a bond indenture between Franklin, as issuer, and IBJ Schroder, as trustee for the holders of bonds (the "Trustee"), Franklin issued a series of 30, 35, and 40 year zero coupon bonds (the "Bonds") in the aggregate principal amount due on maturity of $2.9 billion. The plaintiff-intervenors (the "Plaintiff-Bondholders") (all of whom purchased their Bonds in the secondary market) own in aggregate over 70% of the outstanding Bonds. On February 16, 1990, the Office of Thrift Supervision effectively terminated Franklin's status as a private institution by appointing the RTC as conservator of Franklin. Under 12 U.S.C. § 1821(e)(1), the RTC has the power under certain circumstances to repudiate or disaffirm contracts of an institution under receivership or conservatorship. Because the RTC's personnel who were overseeing the conservatorship of Franklin believed that, by repudiating the bonds, the RTC could save approximately $200 million and could immediately obtain from the Trustee valuable assets otherwise required to be held by the Trustee as collateral securing the performance of the Bonds, they decided to do so. On June 8, 1990, William Roelle, RTC's Director of Resolutions and Operations disaffirmed and repudiated the Indenture and the Bonds.

The Trustee, joined by the Plaintiff-Bondholders, brought suit alleging that (1) the RTC's repudiation of the indenture and the bonds was void because (a) inconsistent with the standards of the governing statute and (b) unauthorized by the RTC, (2) repudiation violated the due process and takings clauses, and (3) in the event that the indenture and the bonds were lawfully repudiated, the damages to which the Bondholders are entitled differs from that offered by the RTC. As discovery progressed, it became a focus of the litigation whether Roelle, as RTC's Director of Resolutions and Operations, had authority under RTC's by-laws to effect the repudiation.

The parties stipulated to the submission of a written record for final trial on the merits. In an Opinion and Order dated October 13, 1992, I held that the repudiation of the bonds by the RTC was invalid because Roelle lacked authority to take such action on the RTC's behalf. Judgment was granted to the Trustee and the Bondholders on October 20, 1992 and was entered on October 21, 1992.

On the day following the entry of Judgment, October 22, 1992, Albert Casey, the Chief Executive Officer of the RTC,[1] held a special meeting and adopted CEO Resolution No. 92-CEO-15, dated October 22, 1992. This resolution, signed by Casey, first recounted the holding of this court's October 13, 1992 decision, and then stated that,

> After consideration of the facts and circumstances concerning the original repudiation decision, the President and Chief Executive Officer concluded that the decision was correct for the reasons set forth by Mr. Roelle . . . . Therefore, the Chief Executive Office hereby ratifies the decision made by the Director, Resolutions and Operations on June 8,

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[1] By terms of the Resolution Trust Corporation Refinancing, Restructuring and Improvement Act of 1991, P.L. 102-233, the newly created position of Chief Executive Officer of the RTC may exercise powers of the RTC and succeeds to the powers previously possessed by the RTC's Board of Directors. The Board of Directors of the RTC was abolished. 12 U.S.C. §§ 1441a(b)(1)(C) and (b)(8).

> 1990, for the Resolution Trust Corporation as Conservator of Franklin, to repudiate the Indenture and the Bonds pursuant to 12 U.S.C. § 1821(e)(1), and such ratification is hereby made retroactive and effective as of the date of the original repudiation, June 8, 1990.

The RTC then moved for relief from the judgment, seeking to reopen the case and receive new findings of fact and conclusions of law or, in the alternative, a new trial. Fed. R. Civ. P. 52(b), 59, and 60(b).

The RTC contends that, by reason of the RTC's ratification made after the entry of Judgment, this court should vacate its Judgment of October 21, 1992, which voided the June 8, 1990 repudiation. I assume for purposes of this ruling that the court has the power in its discretion to grant RTC's motion. For the reasons that follow, I decline to do so. The RTC's motion is denied.

Discussion

I.

There is a strong interest in finality of judgments. *See, e.g., Ackermann v. United States*, 340 U.S. 193, 198 (1950). Where a party could take an act before a court renders judgment, but does not do so until after judgment, reason and fairness counsel that, absent "extraordinary" or "exceptional" circumstances, *Ackermann*, 340 U.S. at 199, the party should not be relieved from the judgment. "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann*, 340 U.S. at 198. The RTC was well aware that Roelle's authority to perform the repudiation was under review in the litigation, and that the court would almost certainly rule on it. The RTC could easily have mooted this issue prior to adjudication by having Roelle's action ratified. For reasons of tactics, it decided not to do so. Only after the adverse ruling and judgment did the RTC take the corrective action of ratification. It could have done so at any earlier time.

The RTC contends that its delay in performing the ratification was justified because, it argues, it was surprised by this court's ruling that the June 1990 repudiation was not valid. It contends there was no reason to perform a ratification of that repudiation until the court's Opinion and Order was rendered. A brief review of the procedural history of this case shows this contention is groundless.

First, the validity of Roelle's June 8, 1990 act of repudiation was squarely at issue in this case. Roelle's authorization had been the subject of discovery disputes and the issue of his authority was fully briefed by both sides.[2] (The RTC's counsel can hardly have been unaware of how weak and strained were their arguments on this issue.) There can be no conceivable doubt the RTC was aware that Roelle's authority was challenged and would be ruled on.

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[2] *See* Plaintiff's Supplemental Memorandum of Law, dated May 11, 1992, at 8-10; Intervenor's Supplemental Memorandum of Law, dated May 11, 1992, at 8-12; RTC's Supplemental Memorandum of Law, dated May 27, 1992, at 8-10; *see also* Plaintiff's Reply to the Resolution Trust Corporation's Supplemental Memorandum of Law, dated June 10, 1992, at 5-11; Intervenor's Reply Memorandum, dated June 12, 1992, at 4-9.

Indeed, while the case was *sub judice* the RTC took elaborate steps to protect itself in the event of an adverse ruling on this issue. Apparently in July 1992, the RTC placed Franklin in a "pass-through" receivership and, in September 1992, performed a "re-repudiation" of the Bonds to be effective only in the event the original repudiation were found ineffective.

Second, the RTC contends it was further justified in believing that the June 1990 repudiation was valid until this court's opinion because no other court has ever concluded that a bond repudiation by the RTC was invalid for lack of authority of the repudiating officer and because many other courts have upheld similar repudiations performed by the RTC. This argument has no merit. None of the cases cited by the RTC litigated the issue whether any particular officer at the RTC possessed delegated authority to repudiate obligations. On all the circumstances, one cannot credit the RTC's contention that it could not reasonably have anticipated the court's ruling and had no reason to ratify so as to moot the issue. What the RTC did and did not do were simply decisions of litigation strategy.

In its motion papers, the RTC looks for support to decisions holding that "where a litigant has not been afforded an opportunity to have his case decided on the merits," the court should afford post-judgment relief. *Rivera v. United States*, 761 F. Supp. 126, 128 (S.D. Fla. 1991) (quoting *In re Cremida's Estate*, 14 F.R.D.

15, 17 (D. Alaska 1953)). Here, however, the RTC did have a full opportunity to have its case decided on the merits. The rules for post-judgment relief are not a vehicle for relieving a party from a "voluntary, deliberate, free, untrammelled choice" that turns out to be unfortunate. *Ackermann*, 340 U.S. at 200.

The RTC argues that denial of its motion will result in a serious hardship or injustice. The RTC contends that invalidation of repudiation of the Bonds will prevent the RTC from obtaining the significant monetary savings, and for that reason this court should grant the motion in the interests of justice. The first answer to this contention is that the court's denial of the motion to vacate the judgment does not necessarily have any significant effect on the RTC's obligations. It may or may not. The litigation that was conducted was over the question whether the RTC's purported act of repudiation *on June 8, 1990*, effectively terminated the executory portion of the contract of debt. This court decided it did not. Whether the RTC thereafter effectively repudiated the Bonds by virtue of a new act was not at issue in the dispute adjudicated on October 20, 1992. The Judgment obviously neither validated nor invalidated acts by the RTC that had not yet occurred. If the RTC retained the power after the court's judgment to repudiate the Bonds by ratification, the effectiveness of that subsequent act does not turn on whether a prior judgment relating to earlier acts is or is not vacated. The parties may well submit new pleadings addressed to the consequences of the post-judgment ratification. But that ratification has no bearing on the finality of the judgment addressed to the facts that were in dispute.

But, furthermore, if the RTC suffers adverse consequences, they are the result of its own deliberate strategic moves. The RTC knew full well that Roelle's authority to act was in dispute and must have known furthermore that its position on this issue was extremely weak. It is elementary corporate law that ratification can cure the defect of lack of prior authorization. The RTC must have considered taking such action. It decided to make a new contingent "fall-back" act of repudiation in September 1992, but to delay ratification of Roelle's June 8, 1990, act until after seeing what decision the court would make. The decision to delay must have resulted from worries about possible alteration of the effective date of repudiation, or the effect on other repudiations, or other similar strategic concerns. If harm now results to the RTC from the strategies it adopted, that is because of defects in its litigating strategies, not because of unfairness in the court's rulings. *See generally Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 332-33 (1971) ("we cannot say that the judge abused his discretion or stressed too much the value of avoiding reopening the trial to litigate matters that HRI had had an opportunity, but neglected, to litigate .... It is quite possible that HRI knew exactly what it was doing in not presenting this argument during trial and that it realized a need to present it only after it learned that its original arguments had not induced the court to hold in its favor.").

The RTC cites several cases which give scant support to its position. In *Orfa Corp. of America v. Coppello (In re Orfa Corp.)*, 115 B.R. 799, 806 (Bankr. E.D. Pa. 1990), immediately following a hearing on the validity of a declaration of bankruptcy, on a motion for preliminary relief, the court found inadequate authorization; the corporation immediately ratified the earlier decision, and the court reversed its ruling. The case did not involve the reopening of a judgment; nor did the facts involve a strategically motivated delay in ratifying. Indeed, given the procedural posture of the case, the court had no realistic alternative but to recognize the ratification once it occurred. In *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 626 F. Supp. 1032, 1033-34 (E.D.N.Y. 1986), the court simply vacated its earlier judgment after the parties reached a post-judgment settlement.[3] And in *Sanders v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 546 F.2d 879, 880-02 (10th Cir. 1976), the trial court first *sua sponte* raised the issue of whether a union trusteeship had been properly ratified, then refused a pre-judgment request to reopen the case to take evidence on the earlier ratification, and finally enjoined the continuation of the trusteeship solely for failure to comply with ratification procedures. In these circumstances — where the ratification had occurred long before the close of evidence and the trial judge refused to receive evidence of the ratification offered before judgment — the Tenth Circuit held that the district court had abused its discretion in refusing to reopen the case. *Id.* at 881.[4] These cases arose on very different facts and involved very different considerations. They suggest little reason why the court should relieve the RTC of its strategic decisions and reopen this judgment after the validity of the June 8, 1990, repudiation was fully litigated to conclusion.

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[3] The only relevance of post-judgment "ratification" to *Independent Union of Flight Attendants v. Pan American World Airways, Inc.* is that the members of the plaintiff union in that case had "ratified" the agreement that purported to settle the dispute. 626 F. Supp. at 1033. Although the union contended that certain litigated issues had not been settled, the court held that the ratified agreement settled all litigated claims and accordingly vacated its earlier judgment. *Id.* at 1034-35. For the RTC to contend that this case supports the assertion that the post-judgment ratification of the repudiation of Bonds at issue in this case is grounds for relief from the judgment is disingenuous. *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 950 (5th Cir. 1975), cited by the RTC, is also inapposite. There, the Court of Appeals held that the trial court had not abused its discretion in reopening the case before even charging the jury in order to receive evidence of a ratification that effectively transferred a cause of action. Obviously, the reopening in *Copper Liquor* was sought and occurred well before judgment.

Turning to the particular provisions of the Federal Rules of Civil Procedure upon which the RTC relies for relief, I conclude that none of them support, let alone require, alteration of the judgment based on events occurring after the judgment, which events were within the control of the party seeking relief.

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[4] The Court of Appeals in *Sanders* stressed that "it was not until the case had been submitted and the trial judge had the matter under advisement that for the first time it became clear to all that the trial judge was seriously concerned about this particular phase [the ratification] of the case. It was in such circumstance that the International sought to reopen the case and be allowed to offer evidence on this particular matter, suggesting, by affidavit, that there had in fact been ratification. . . . If the trial court was going to turn the entire case on lack of ratification it would seem better practice to permit the parties the opportunity to fully develop the evidence relating thereto." *Id.* at 882. In contrast, here, as noted, the validity of the June 8, 1990 repudiation was fully litigated in the spring of 1992, and the "ratifying" act did not occur until *after* the court's final judgment.

Rule 60(b) provides, in pertinent part, that,

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . or (6) any other reason justifying relief from the operation of the judgment.

"Rule 60(b) was intended to preserve 'the delicate balance between the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done in light of *all* the facts.' " *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) (quoting *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970) (emphasis in *Bankers Mortgage*) (other citations omitted)). However, relief under Rule 60(b)(6) is appropriate only under "extraordinary" or "exceptional" circumstances. *Ackermann v. United States*, 340 U.S. 193, 199 (1950); *Mendell on behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 2173 (1991); *Nemaizer*, 793 F.2d at 63; *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983); *House v. Secretary of Health and Human Services*, 688 F.2d 7, 9 (2d Cir. 1982).

Here, the RTC does not point to any circumstance that justifies Rule 60(b)(6) relief. The

RTC argues that millions of dollars are at stake. As noted above, this is not necessarily true. The effect of the October 22, 1992, ratification may be the same regardless whether the court vacates its earlier judgment. Also, as noted above, the RTC had previously effected a fall-back repudiation, in the event the June 8, 1990 repudiation was held invalid.

The relevant circumstance here is that the RTC could have, but for strategic reasons did not, take actions during the litigation leading up to the October 13, 1992 Opinion and Order. It is settled law that "Rule 60(b) cannot . . . be employed simply to rescue a litigant from strategic choices that later turn out to be improvident." *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) (citing cases); *accord Nemaizer*, 793 F.2d at 62 ("[m]ere dissatisfaction in hindsight with choices deliberately made" not enough for relief); *Ackermann v. United States*, 340 U.S. 193, 200 (1950) (where movants had made deliberate decision not to appeal, no relief from a "voluntary, deliberate, free, untrammeled choice" that turns out to be erroneous); *Wagner Spray Tech Corp. v. Wolf*, 113 F.R.D. 50, 53 (S.D.N.Y. 1986) ("Larius' interest in undoing the results of a litigation strategy which, in hindsight, appears unwise fails to outweigh the judiciary's interest in the finality of judgments."); *see also Mendell on behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990) ("Plaintiff's acquisition of a note following an adverse ruling on his claim to standing as a shareholder did not present the kind of 'extraordinary' circumstance that mandates relief to avoid an 'extreme and undue hardship.'"), *aff'd on other grounds*, 111 S. Ct. 2173 (1991); *Andrews v.*

Heinold Commodities, Inc., 771 F.2d 184, 188-89 (7th Cir. 1985).

Rule 52(b) provides that, on motion, the court "may amend its findings or make additional findings" and amend the judgment accordingly. Rule 52(b) may be used to correct manifest errors of law or fact, or to present newly discovered evidence. *Wallace v. Brown*, 485 F. Supp. 77, 78 (S.D.N.Y. 1979) (citing *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976)), but courts have made clear that Rule 52(b) is not to be used to "relitigate old matters" or "to allow parties to present the case under new theories," *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976), "when the moving party has had a previous opportunity to advance such arguments at trial." *Wallace v. Brown*, 485 F. Supp. at 78; *accord Sims v. Mme. Paulette Dry Cleaners*, 1986 WL 12511 (S.D.N.Y. 1986).

> The primary purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court as a basis for the conclusions of law and judgment entered thereon. *A party who failed to prove his strongest case is not entitled to a second opportunity* by moving to amend a finding of fact and a conclusion of law.

C. Wright & A. Miller, *Federal Practice and Procedure* § 2582, at 722 (1971) (citing cases) (emphasis added). Here, the RTC not only relies on a strategy it had rejected prior to judgment but also on facts which did not exist at the time of the judgment. The ratification cannot be considered newly discovered evidence.

Finally, Rule 59(a) provides, in pertinent part,

> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Like Rule 52(b), Rule 59 is not intended to allow a party "to relitigate old matters" or to "present the case under new theories." *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill.1976); *accord Wallace v. Brown*, 485 F. Supp. at 78; *Sims v. Mme. Paulette Dry Cleaners*, 1986 WL 12511 (S.D.N.Y. 1986). To the degree the RTC seeks a new trial based on "newly discovered evidence," the ratification does not qualify, for it is both evidence that did not exist at the time of trial and evidence that "could have been available at trial to the party seeking a new trial." *Ope Shipping, Ltd. v. Underwriters at Lloyds*, 100 F.R.D. 428, 432 (S.D.N.Y. 1983) (quoting *McCullough Tool Co. v. Well Surveys, Inc.*, 343 F.2d 381, 410 (10th Cir. 1965)); *see Campbell v. American Foreign S.S. Corp.*, 116 F.2d 926, 928 (2d Cir.) (If "facts occurring subsequent to the trial" were "ground for a new trial," the "litigation would never come to an end."), *cert. denied*, 313 U.S. 573 (1941); *Alison v. United States*, 251 F.2d 74, 76 (2d Cir. 1958).

The RTC emphasizes that "Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. It is his right, and indeed his duty, to order a new trial if he deems it in the interests of justice to do so." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2803, at 31-32 (1973). But the RTC fails to show that any injustice would result from refusing to relieve the RTC of the strategy it deliberately adopted.

II.

In its reply memorandum, the RTC raises for the first time the contention that the "RTC's actions in standing behind and consistently supporting the Original Repudiation were sufficient to constitute an implied ratification of that decision even before this Court reached its decision." RTC Reply Mem. at 11-12. This contention cannot support post-judgment relief.

Here, the RTC is relying on evidence in existence and entirely known to the RTC before this court's October 13, 1992 Opinion and Order, but not presented to the court. Assuming, for the sake of argument, that a ratification of repudiation, consistent with the requirements of 12 U.S.C. § 1821(e), can occur through implication,[5] and that the actions of the RTC's Board of Directors would constitute such a repudiation, the fact remains that the evidence of this implied ratification was known to the RTC during the course of this litigation. Yet at no time did the RTC present evidence of it. As explained already, it is not the purpose of the Federal Rules of Civil Procedure to allow a party "to relitigate already-decided factual issues and present new legal theories based on evidence available, though not used, during trial" "[u]nder the guise of seeking an amendment of th[e] court's finding because of an alleged 'manifest error.'" *Wallace v. Brown*, 485 F. Supp. 77, 78 (S.D.N.Y. 1979). "The applicable federal rules prohibit such attempts when the moving party has had a previous opportunity to advance such arguments at trial." *Id.* at 78; *accord Evans Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976); *Sims v. Mme. Paulette Dry Cleaners*, 1986 WL 12511 (S.D.N.Y. 1986).

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[5] As repudiation under 12 U.S.C. § 1821(e) involves certain specific determinations, *see* § 1821(e)(1)(B), (C); Opinion and Order of October 13, 1992, at 11-15, this is a significant assumption.

But even to the extent that a court would have discretion to reopen the judgment, the present circumstances disfavor granting such relief. I conclude that the RTC has not shown an adequate basis for relief from the final judgment entered October 21, 1992, amendment of the judgment, or a new trial. The motion is denied.

Conclusion

The RTC's motion is denied.

Date: New York, NY
July 22, 1993

SO ORDERED

/S/
Pierre N. Leval, U.S.D.J.

APPENDIX F

The principal statutory provision involved in this case is Section 212(e) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1821(e). Section 212(e) of FIRREA provides in relevant part:

(e) Provisions relating to contracts entered into before appointment of conservator or receiver

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conversator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation

The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

(3) Claims for damages for repudiation

(A) In general

Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be—

(i) limited to actual direct compensatory damages; and

(ii) determined as of—

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include—

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts

In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be—

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (i) of this section except as otherwise specifically provided in this section.

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(11) Certain security interests not avoidable

No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

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Supreme Court, U.S.
FILED
DEC 28 1994
CLERK

No. 94-889

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,

AND

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION, as Conservator for
FRANKLIN SAVINGS ASSOCIATION,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

Petitioners respectfully submit this supplemental brief in support of their Petition for Certiorari, filed November 15, 1994, solely to discuss the impact of this Court's decision in *Federal Election Commission v. NRA Political Victory Fund*, No. 93-1151 (Dec. 6, 1994) ("*FEC v. NRA*"), which was issued after Petitioners filed their Petition for Certiorari in this case. *FEC v NRA* requires vacating the decision of the Court of Appeals and remanding the case to the Court of Appeals for further proceedings, as described below.

I.

UNDER THIS COURT'S RECENT RULING IN *FEC v. NRA*, THE COURT OF APPEALS LACKED JURISDICTION OVER THE RTC'S APPEAL, AND THEREFORE THE DECISION OF THE COURT OF APPEALS SHOULD BE VACATED AND THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REINSTATED

A. The Holding In *FEC v. NRA*

In *FEC v. NRA*, this Court ruled that, under 28 U.S.C. § 518 and 28 C.F.R. § 0.20, absent express statutory authority, a federal agency "is not authorized to petition for certiorari in this Court on its own, and that the effort of the Solicitor General to authorize the [agency's] petition after the time for filing it had expired did not breathe life into it." Opinion at 1.[1] Because the Solicitor General had not filed the agency's petition, or timely authorized the agency to do so itself, the petition was a nullity and had to be dismissed for lack of jurisdiction. Moreover, although the Solicitor General had expressly given the agency after-the-fact, retroactive permission to file the petition, this had occurred "after the deadline for filing the petition had passed", *see* 28 U.S.C. § 2102(c). Accordingly, this Court held that the "'after-the-fact' authorization does not relate back to the date of [the agency's] unauthorized filing so as to make it timely." Opinion at 10, 11.

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[1] 28 U.S.C. § 518 provides in pertinent part that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General *shall* conduct and

B. The Impact *FEC v. NRA* On This Case

In the present case, pursuant to the same statutory provisions, 28 U.S.C. § 518(b) and 28 C.F.R. § 0.20(b), the RTC was required to obtain authorization from the Solicitor General before filing its notice of appeal in the Court of Appeals.

The Solicitor General did not file the RTC's notice of appeal in the Court of Appeals in this case, and counsel for

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argue suits and appeals in the Supreme Court" and "*may* . . . conduct and argue any case in a court of the United States" in which "the United States is interested." (Emphasis added.) By regulation, the Attorney General has expressly delegated this authority, specifying that certain Government litigation matters are to "be conducted, handled, or supervised by the Solicitor General, in consultation with each agency or official concerned." 28 C.F.R. § 0.20. These matters include "[c]onducting . . . all Supreme Court cases", 28 C.F.R. § 0.20(a), and "determining whether, and to what extent, appeals will be taken by the Government to all appellate courts . . . ." 28 C.F.R. § 0.20(b). The RTC is an agency of the Government for such purposes pursuant to 12 U.S.C. §§ 1441a(b)(1)(B) and 1819(b)(1).

the RTC and the Solicitor General have confirmed that there is no record that the Solicitor General ever authorized the RTC to do so itself. Moreover, it is now too late for the Solicitor General to grant such authority because the time for filing the notice of appeal expired over a year ago.[2] As "'[t]he timing of appealability [has] jurisdictional consequences,' . . . [an] 'after-the-fact' authorization [would] not relate back to the date of the [RTC's] unauthorized filing so as to make it timely." *FEC v. NRA* at 11 (citation omitted).

In sum, because the Solicitor General did not file the notice of appeal in the Court of Appeals or authorize the RTC to do so itself, and because any retroactive authorization granted now would not relate back, the Court of Appeals never had jurisdiction over the RTC's appeal and cannot now obtain it. This Court should therefore grant the Petition, vacate the decision of the Court of Appeals, and remand to the Court of Appeals with instructions to dismiss the appeal.

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[2] The District Court entered judgment on October 12, 1992, A 1446-68, and denied the RTC's motion for relief from the judgment on July 22, 1993. A 1488-1505. The RTC was required to file a proper notice of appeal within 60 days of that latter date, Fed. R. App. P. 4(a)(1).

II.

ALTERNATIVELY, THE CASE SHOULD BE REMANDED WITH DIRECTIONS TO THE COURT OF APPEALS TO DETERMINE WHETHER ANY AFTER-THE-FACT AUTHORIZATION OF THE REPUDIATION OCCURRED WITHIN THE STATUTORILY-PRESCRIBED TIME PERIOD

This Court's opinion in *FEC v. NRA* teaches that "principles of agency law" apply to the Government just as they do to ordinary civil litigants. Opinion at 10. Principles of agency law are of paramount importance in the instant case, which concerns the Official's attempt to exercise a governmental power that had not been vested in him. The RTC, the District Court, and the Court of Appeals all agree with Petitioners that Congress gave the power to repudiate contracts only to the RTC, and that the RTC's bylaws delegated that power to the RTC's Board of Directors and to no one else. Thus, unless the Board's authority to exercise the repudiation power was conferred upon the Official in accordance with the principles of agency law that this Court in *FEC v. NRA* held applicable to the Government, the repudiation was a nullity.

In *FEC v. NRA*, this Court expressly reaffirmed a rule of agency law that the Court of Appeals below overlooked: any attempt to ratify or authorize an unauthorized act must meet the timeliness requirements applicable to the act itself. This Court held that "it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made.*" Opinion at 10 (quoting *Cook v. Tullis*, 18 Wall. 332, 338 (1874) (emphasis in *FEC v. NRA*)).

Thus, in *FEC v. NRA* because "the Solicitor General had authorized the FEC's petition" for certiorari after expiration of the time for filing such a petition, see 28 U.S.C. § 2101(c), "[h]is authorization simply came too late in the day to be effective." Opinion at 10.

In the present case, the Court of Appeals found that, although it was undisputed that the repudiating Official lacked authority to exercise the RTC's repudiation power, an "after-the-fact authorization" by the RTC's Board of Directors retroactively cured the defect. The Court of Appeals stated that "the RTC Board of Directors knew and fully approved of [the Official's] exercise of the power of repudiation," and that "there was strong evidence of prejudgment ratification which could have been relied upon by the District Court had it been timely argued by RTC." App. A, 12-13a.

However, the governing statute provides that the RTC may only exercise its repudiation power "within a reasonable period" after it is appointed as conservator. 12 U.S.C. 1821(e)(2).[3] Hence, under this Court's holding in *FEC v. NRA*, if an "after-the-fact authorization" of the Official's original June 8, 1990 repudiation is to be given effect, that authorization would have to have been made within a "reasonable period" of the RTC's appointment as conservator for Franklin on February 16, 1990.

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[3] Moreover, the RTC itself has promulgated an official "Policy Statement" in which it has interpreted the phrase "reasonable period" to mean that the repudiation must be accomplished within 60 days of the RTC's appointment. App. C, 32a.

The Court of Appeals did not make *any* finding concerning *when* the supposed "after-the-fact authorization" of the Official's acts occurred. Indeed, the Court of Appeals did not identify either the acts by which the Board authorized the Official's repudiation of the Bonds or the timing of those acts. The Second Circuit therefore did not consider whether the "after-the-fact authorization" was timely under 12 U.S.C. § 1821(e)(2). Thus, this Court should vacate the decision of the Court of Appeals and remand this case for consideration of the timeliness requirements, enunciated in *FEC v. NRA*, of any supposed authorization event.

III.

THE COURT OF APPEALS' HOLDING THAT THE RTC'S "CUSTOMARY PRACTICE" AUTHORIZED THE OFFICIAL'S REPUDIATION IS IN CONFLICT WITH THIS COURT'S HOLDING IN *FEC v. NRA*

Although it is undisputed that the RTC's Board never expressly delegated its authority to repudiate contracts to the Official, the Court of Appeals found that the Board either impliedly subdelegated its power to the Official or impliedly ratified his action. App. A, 13a.[4] In so finding, the Court of Appeals made unsupported assumptions about the RTC's "customary practices" and litigation history.

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[4] As set forth in the Petition, no party argued at trial that the repudiation had been impliedly authorized or impliedly ratified. No evidence was adduced at trial on these issues, and there was no basis in the record to support the Court of Appeals' "findings". (In fact, the only evidence is directly contrary. See Petition at 15-17.) The District Court made no findings of fact with respect to any of these issues, which were not raised at trial.

However, in *FEC v. NRA*, this Court came to the opposite conclusion on very similar facts, ruling that a governmental agency's customary practice or litigation routine cannot substitute for an express delegation of authority, especially where the exercise of that authority previously has not been challenged. In *FEC v. NRA*, the Federal Election Commission argued that it had represented itself repeatedly before this Court -- in essence that an implied subdelegation of the Solicitor General's authority could be inferred from the FEC's customary practice of litigating independently in this forum. This Court rejected that argument, noting that it was not "impressed by the FEC's argument that it has represented itself before this Court on several occasions in the past without any question having been raised regarding its authority to do so." Opinion at 8.

Likewise, in the present case, no one ever before had challenged the Official's authority to repudiate a contract -- much less his authority to repudiate a $2.9 billion bond issue. Thus, the Second Circuit's finding that the RTC's supposed customary practice or litigation routine somehow authorized the Official to take an action expressly reserved to the RTC's Board of Directors is inconsistent with this Court's holding in *FEC v. NRA*. At a minimum, the Petition should be granted and the case remanded for reconsideration by the Second Circuit in light of *FEC v. NRA*.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, Petitioners respectfully request that this Court grant the Petition for Certiorari, vacate the decision of the Court of Appeals, and remand with instructions to dismiss the RTC's appeal. Alternatively, the Petition should be granted and the case remanded for further consideration in light of *FEC v. NRA*.

December 28, 1994

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SUPPLEMENTAL
BRIEF

(2)

No. 94-889

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,

AND

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA, et al.,
Petitioners,

v.

RESOLUTION TRUST CORPORATION, as Conservator for
FRANKLIN SAVINGS ASSOCIATION,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITIONERS HAVE MADE A MOTION FOR RELIEF FROM THE COURT OF APPEALS' JUDGMENT

Petitioners respectfully submit this supplemental brief in support of their Petition for Certiorari, filed November 15, 1994, to inform the Court that Petitioners have made a motion to the Court of Appeals for relief from the Court of Appeals' Order. Petitioners have made this motion to the Court of Appeals because it has only recently become apparent that the Resolution Trust Corporation did not file a timely notice of appeal from the judgment of the District Court for the plaintiffs. Thus, the Court of Appeals did not have jurisdiction to review the District Court's decision. Petitioners have requested that the Solicitor General consent to a remand for this purpose, but that request has thus far been denied.

Petitioners have already informed this Court of jurisdictional defect in their Supplemental Brief dated December 28, 1994. That brief was submitted to make this Court aware of the ramifications of one of its recent decisions, *Federal Election Commission v. NRA Political Victory Fund*, No. 93-1151 (Dec. 6, 1994) ("*FEC v. NRA*"), on the instant case. However, Petitioners believe that it is more appropriate for the Court of Appeals to consider the issue of its own jurisdiction in the first instance and thus respectfully submit that this Court should not consider this issue until the Court of Appeals has had an opportunity to rule.

February 24, 1995

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals engaged in improper fact finding.

2. Whether the court of appeals erred in finding that the RTC's Board of Directors delegated the decision to repudiate burdensome contracts to its Director of Resolutions and Operations.

3. Whether the RTC's ratification of the Director of Resolutions and Operations' repudiation decision conflicts with *FEC* v. *NRA Political Victory Fund,* 115 S. Ct. 537 (1994).

4. Whether court of appeals lacked jurisdiction over the RTC's appeal because the agency failed to obtain authorization from the Solicitor General to appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 26 F.3d 370. The October 13, 1992, opinion and order of the district court (Pet. App. 17a-38a) is reported at 803 F. Supp. 878. The October 20, 1992, judgment of the district court (Pet. App. 39a-40a) is unreported. The July 22, 1993, opinion and order of the district court (Pet. App. 41a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1994. Petitions for rehearing were denied on August 17, 1994, and August 19, 1994. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on November 15, 1994. The supplemental brief in support of the petition for a writ of certiorari was filed on December 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Franklin Savings Association (Franklin) issued zero coupon bonds in December, 1984. For net proceeds of less than $65 million, Franklin committed itself to pay interest rates ranging from 11% to 11.75% for a period of up to 40 years, compounding to a total repayment obligation of $2.9 billion. Pet. App. 4a-5a.

In February, 1990, the Office of Thrift Supervision appointed the Resolution Trust Corporation (RTC) as conservator for Franklin. By this time, interest rates had dropped substantially. William Roelle, then the Director of Resolutions and Operations at the RTC, who was in charge of the Corporation's conservatorship operations, concluded that repudiating the bonds early would realize in excess of $140 million in savings for the conservatorship. Pet. App. 30a-31a. Roelle thus found that continued payments of the bonds "was a clear cut burdensome contract" (C.A. App. 1098a-1099a), and pursuant to the RTC's authority to repudiate burdensome contracts under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C.

1821(e)(1) (Supp. V 1993), the RTC repudiated the bond indenture and offered to pay the bonds off early.[1]

2. The Trustee under the bond indenture and a group of bondholders challenged the validity of the repudiation decision in the United States District Court for the Southern District of New York. The parties filed cross-motions for summary judgment, later converted at the suggestion of the district court into written submissions in lieu of a trial. C.A. App. 802a-803a. No factual disputes existed and no live testimony was heard. Pet. App. 45a.

The district court, in interpreting the written record, concluded that the RTC's Board of Directors did not delegate to Roelle the authority to repudiate burdensome contracts. Pet. App. 36a. The court thus held that Roelle's repudiation of the bonds was invalid. *Id.* at 38a.

Immediately after the district court's ruling, the Chief Executive Officer of the RTC (the statutory successor to the RTC Board of Directors) formally ratified Roelle's repudiation decision. Pet. App. 45a-46a. The district court refused to consider the ratification, however, because it occurred after judgment had been entered. *Id.* at 56a-57a.

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[1] 12 U.S.C. 1821(e)(1) (Supp. V 1993), which applies to the RTC pursuant to 12 U.S.C. 1441(b)(4), provides that the conservator or receiver for an insured depository institution may, within a "reasonable period" following its appointment, "disaffirm or repudiate any contract or lease" to which the institution is a party, if the conservator or receiver determines, in its discretion, that the contract or lease is "burdensome" and that disaffirmance or repudiation "will promote the orderly administration of the institution's affairs." The statute contains no directive regarding who at the agency must make that determination.

3. The court of appeals reversed. The court noted that the RTC's delegation of the decision to repudiate burdensome contracts was a matter of internal agency organization, and that the RTC had the authority to choose the manner in which it exercised its powers. Pet. App. 12a-13a. The court then held that the RTC intended Roelle to have the authority to repudiate contracts. *Id.* at 12a, citing the RTC's support for Roelle's action in its answer and complaint filed in response to petitioners' action, and its conscious failure to take any action inconsistent with Roelle's determination. *Id.* at 13a. The court found it unnecessary to consider the impact of the formal ratification of Roelle's decision. *Ibid.*

ARGUMENT

1. Petitioners argue (Pet. 14-18) that the court of appeals engaged in impermissible factfinding.

Contrary to petitioners' contention, the court of appeals in this case engaged in no fact-finding. There were no factual disputes before the district court, and no live testimony was heard. The record compiled by the district court was entirely written. The court of appeals analyzed that written record, and drew legal conclusions and inferences that were contrary to those drawn by the district court. The court of appeals examined the pleadings of the parties, the RTC's bylaws, and the document delegating authority from the RTC Board of Directors to Roelle, and concluded that the Board of Directors intended Roelle to have the power to repudiate contracts. Pet. App. 12a. In making its ruling, the court of appeals thus correctly did not consider evidence outside of the record, and made no factual findings. See *Lancaster Glass Corp.*

v. *Philips ECG, Inc.*, 835 F.2d 652, 658 (6th Cir. 1987). It is entirely proper for a reviewing court to make "an independent determination as to the legal conclusions and inferences which should be drawn from" a lower court's written record. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). See also *LTV Educ. Sys., Inc.* v. *Bell,* 862 F.2d 1168, 1172 (5th Cir. 1989).

2. Petitioners also contend (Pet. 18-25) that the court of appeals' conclusion that the RTC delegated authority to Roelle to make repudiation decisions creates a conflict among the circuits.

As petitioners themselves concede in their supplemental brief, no other court has considered the issue presented in this case: whether the RTC Director of Resolutions and Operations has been delegated the authority to repudiate burdensome contracts. See Pet. Supp. Br. 8. Although petitioners dispute the informal method by which the Board of Directors delegated the power to repudiate contracts to Roelle, internal agency delegation processes do not create enforceable rights that permit third parties to challenge the validity of agency action in the absence of a conflict with the requirements of a statutory mandate or published regulation. *Schweiker* v. *Hansen,* 450 U.S. 785, 789-790 (1981) (per curiam); *United States* v. *Caceres,* 440 U.S. 741, 755-756 (1979); *J.W. Hampton, Jr. & Co.* v. *United States,* 276 U.S. 394, 405 (1928). See also *Mistretta* v. *United States,* 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

FIRREA contains no requirement or restriction regarding the RTC's repudiation authority, other than the directives that the RTC determine, in its discretion, that the contract is burdensome and that its repudiation would promote the orderly administration of the conservatorship. See 12 U.S.C. 1821(e)(1) (Supp. V 1993). The RTC's Board of Directors authorized the Director of Resolutions and Operations to make that determination. Pet. App. 12a. That internal agency decision was neither prohibited by statute nor contrary to a published regulation. Its validity therefore is not judicially reviewable at the behest of third parties.[2]

Furthermore, even if petitioners were correct that Roelle did not initially have authority to make the repudiation decision, the RTC's subsequent adoption of Roelle's decision would negate any internal procedural flaw. Pet. App. 13a. See *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action."); see also *Law* v. *Cross*, 66

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[2] The authorities cited by petitioners as conflicting with the decision of the court of appeals all involve other governmental entities that failed to comply with explicit statutory or regulatory provisions. See *Lopez-Telles* v. *INS*, 564 F.2d 1302, 1304 (9th Cir. 1977) (immigration judges are without discretionary authority to countermand the decisions of the INS to prosecute aliens); *United States* v. *Emerson*, 846 F.2d 541, 546-548 (9th Cir. 1988) (the DEA was without authority to schedule a drug as a controlled substance, because the applicable statute expressly authorized the Attorney General to make such determinations, which could be delegated only through published regulations); *United States* v. *True*, 946 F.2d 682 (9th Cir. 1991) (forest ranger acted contrary to a published regulation); *United States* v. *Gemmill*, 535 F.2d 1145 (9th Cir.), cert. denied, 429 U.S. 982 (1976) (same). In contrast, FIRREA prescribes no procedure for repudiation decisions, but grants general repudiation authority to the RTC, retaining in the corporation the power to decide who can make the substantive repudiation decision.

U.S. (1 Black) 533, 539-540 (1862) (principal can ratify the unauthorized act of an agent).

3. Petitioners argue in their supplemental brief (Supp. Pet. Br. 5-7) that the court of appeals' finding that the RTC ratified Roelle's repudiation decision conflicts with *FEC* v. *NRA Political Victory Fund,* 115 S. Ct. 537, 539 (1994).

In *NRA,* 115 S. Ct. at 539, the Federal Election Commission (FEC) filed a petition for certiorari without the prior authorization of the Solicitor General. The Solicitor General subsequently authorized the petition after the ninety-day period for filing a petition had elapsed. *Ibid.* This Court held that the FEC was not empowered to file a petition for certiorari without the Solicitor General's authorization, and, because that authorization came after the filing period had expired, the petition was untimely. *Id.* at 539-543.

In the present case, the court of appeals stated that it was not relying on the FTC's ratification of Roelle's decision in making its ruling. Pet. App. 13a-14a ("Because we so hold, we need not consider the merits of the district court's rejection of [the] RTC's post-judgment formal ratification of Roelle's acts."). Thus, *NRA* has no bearing on the ruling below. Furthermore, the situation in *NRA* was different from that in the present case in two fundamental ways. In *NRA* the requirement of Solicitor General authorization of the agency's petition for certiorari was statutorily imposed. See 28 U.S.C. 518(a); 28 C.F.R. 0.20(a). In contrast, FIRREA contains no provision regarding who at the RTC has the authority to make repudiation decisions. In addition, in *NRA*, the Solicitor General's authorization came after the jurisdictional filing period had expired. The Court held that the authorization therefore "came too late in the day to be effective." 115 S. Ct. at 543. There is no similar allegation that the ratification of Roelle's decision was untimely.

4. Petitioners also contend in their supplemental brief (Pet. Supp. Br. 2-4) that, under *NRA*, the court of appeals had no jurisdiction because the RTC failed to obtain the approval of the Solicitor General before filing its notice of appeal. That argument is untimely and not appropriate for this Court's review in this case.

A supplemental brief, filed while a petition for certiorari is pending, may be filed after the jurisdictional 90-day period for filing a certiorari petition has expired.[3] Supreme Court Rule 15.7 restricts such a brief to "calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing." It is doubtful whether new grounds for seeking certiorari can ever be presented in a supplemental brief filed after the time to petition has expired. Certainly, petitioners may not use such a brief to advance arguments that were available to them at the time the petition for certiorari was filed.

The grounds for seeking certiorari advanced by petitioners in their supplemental brief were available when they filed the petition for certiorari. *NRA* did not create new law relevant to this case, but applied legal principles clearly set forth in *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988). See *NRA*, 115 S. Ct. at 540. In *Providence Journal*, the Court held that, unless Congress "exempt[s] litigation from the otherwise blanket coverage of [28 U.S.C. 518(a)]," 485 U.S. at 705 n.9, cases before the Supreme Court "must be conducted and argued * * * by the Solicitor General or his designee." *Providence Journal*, 485 U.S. at 700. Applying that ruling in *NRA*, this Court held that, because Congress failed to exempt the FEC from 28 U.S.C. 518(a), the FEC was not entitled to file a petition for certiorari without Solicitor General authorization. *NRA*, 115 S. Ct. at 541-542. *NRA* stated no new principle regarding either the effect of an appeal taken without legal authorization or the interpretation of statutes conferring litigating authority on federal agencies. In addition, *NRA* concerned authority of federal agencies to litigate in this Court under 28 U.S.C. 518(a), not authority to pursue litigation in the lower courts under different statutory provisions applicable to that issue. See 28 U.S.C. 516, 519. The *NRA* decision therefore did not recognize any new principle relevant to the grounds for certiorari raised in petitioners' supplemental brief.[4]

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[3] 28 U.S.C. 2101(c) provides that a petition for certiorari must be filed within 90 days after entry of final judgment by the court of appeals. That "90-day limit is mandatory and jurisdictional." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). See also Sup. Ct. R. 13.1, 13.3. The court of appeals here denied petitioners' motion for rehearing on August 17, 1994. Petitioners filed their supplemental petition on December 28, 1994, more than 130 days after the court of appeals' final ruling.

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[4] *NRA*, 115 S. Ct. at 543, also held that the Solicitor General could not authorize a petition for certiorari after the filing period had expired. Petitioners do not contend, however, that the Solicitor General attempted to ratify the appeal in this case. Any new principle about the retroactive effect of an authorization announced in *NRA* would thus be inapplicable to the arguments petitioners seek to raise.

In any event, petitioners' new claim was not raised below, and this Court rarely grants certiorari to decide "questions not raised or resolved in the lower court." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). See *Lawn* v. *United States*, 355 U.S. 339, 362-363 (1958); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Indeed we are aware of no federal court that has considered whether the RTC has the authority to appeal adverse judgments in district courts without the authorization of the Solicitor General. In the absence, not only of a circuit conflict, but of any lower court examination of the issue, this Court's review is plainly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-889

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,

AND

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA, et al.,
Petitioners,

v.

RESOLUTION TRUST CORPORATION, as Conservator for
FRANKLIN SAVINGS ASSOCIATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully submit this reply brief in support of their Petition for Certiorari, filed November 15, 1994.

I.

UNDER *FEC v. NRA*, THE COURT OF APPEALS LACKED JURISDICTION OVER THE RTC'S APPEAL

The RTC's brief in opposition is most startling for what it does *not* say on the issue of the Court of Appeals' jurisdiction. The RTC does not dispute that:

- In *Federal Election Commission v. NRA Political Victory Fund*, ___ U.S. ___, 115 S. Ct. 537 (Dec. 6, 1994) ("*FEC v. NRA*"), this Court ruled that, under 28 U.S.C. § 518 and 28 C.F.R. § 0.20, absent express statutory authority, a federal agency "is not authorized to petition for certiorari in this Court on its own", and that the Solicitor General cannot retroactively authorize an agency's petition "after the time for filing it had expired . . . ."

- Under the same statutory provisions, 28 U.S.C. § 518(b) and 28 C.F.R. § 0.20(b), absent express statutory authority, a federal agency likewise is not authorized to file a notice of appeal in any Court of

Appeals without first obtaining authorization from the Solicitor General.

- No statute gives the RTC independent litigating authority in the Courts of Appeals.

- In this case, the RTC failed to obtain the Solicitor General's authorization before filing its notice of appeal of the District Court's October 20, 1992 Judgment.

- Under this Court's ruling in *FEC v. NRA*, 28 U.S.C. § 518(b) and 28 C.F.R. § 0.20(b), the RTC's notice of appeal in this case was a nullity, and the time for filing an appeal of the Judgment has expired and cannot now be extended retroactively.

In response, the RTC merely claims that Petitioners' argument is "untimely" because not raised below or in the Petition.[1] Trying to bootstrap its claim, the RTC asserts that *FEC v. NRA* did not "create any new law relevant to this case", and thus that Petitioners should have figured out sooner that the RTC's appeal of the Judgment was unauthorized. The RTC's argument must be rejected for several reasons.

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[1] *FEC v. NRA* was published after the Petition was filed in this case. Petitioners did not learn that the RTC had failed to obtain the Solicitor General's consent for the appeal until making inquiries after publication of *FEC v. NRA*.

First, if the RTC's argument that *FEC v. NRA* "stated no new principle" were true, then the RTC must have known all along that it lacked authority to litigate in the Court of Appeals without the Solicitor General's authorization. This Court should not now reward the RTC for having knowingly violated the law, merely because the RTC managed to keep its violation a secret until after its appeal was determined by the court below.

Second, the RTC misses the point in arguing that the Petition should be denied because this question was not "raised or resolved in the lower court." (Opp. Brief at 10, quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976).) Petitioners do not wish to impose upon this Court to decide this question in the first instance. Indeed, the Petition *seeks* a remand to the Second Circuit for reconsideration in light of *FEC v. NRA* — the same procedure that the Court in fact followed in *Youakim v. Miller*. Moreover, Petitioners have both sought the RTC's consent to a remand to the Second Circuit (which consent the RTC denied) and moved the Second Circuit for relief from its decision (as noted in Petitioners' Supplemental Brief dated February 24, 1995).

Third, a court's failure to obtain jurisdiction over an appeal is so fundamental an issue that it can never be waived. Indeed, in *FEC v. NRA* and *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), the issue of this Court's jurisdiction was raised *after* certiorari had been granted and *after* the matter had been fully briefed on the merits. Moreover, in *FEC v. NRA*, no party raised the jurisdictional issue, and that issue was briefed only after this Court demanded such briefing *sua sponte*.

Finally, the Court should reject the RTC's contention that *FEC v. NRA* "did not create new law relevant to this case, but [merely] applied legal principles clearly set forth in *United States v. Providence Journal Co.*" (Opp. Brief at 9.) *Providence Journal* dealt only with the ability of a judicially appointed special prosecutor (not a federal agency) to proceed before the Supreme Court after he had publicly sought — and been denied — the authorization of the Solicitor General. (As noted above, in the present case Petitioners had no reason to believe that the RTC had failed to obtain the Solicitor General's consent to appeal the Judgment or that the Solicitor General would not attempt to authorize it retroactively if he had not done so prospectively.)

Providence Journal thus did not anticipate this Court's ruling in *FEC v. NRA* that the jurisdictional time periods for filing a notice of appeal or petition for certiorari can not be extended through "after-the-fact authorizations." It is this new standard that leads to the inescapable conclusion that the Court of Appeals' decision must be vacated because the Solicitor General's authorization of the notice of appeal was not obtained and cannot now be obtained retroactively.

II.

CERTIORARI SHOULD BE GRANTED ON THE MERITS OF THIS CASE.

The RTC does not adequately refute either of the Petitioners' arguments in support of the granting of certiorari on the merits of this case.

First, the RTC states in conclusory fashion that the "court of appeals in this case engaged in no fact-finding" and relied on the written "record compiled by the district court" (Opp. Brief at 4). But the fact that the Court reviewed a written record does not mean that it did not engage in fact-finding;[2] it clearly did so or it could not have found an authorization by the RTC's Board. Neither the RTC nor the opinion below points to anything in that record that supports the inferences drawn and findings made by the Court of Appeals.[3]

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[2] *See* Fed. R. Civ. P. 52(a)("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous.")

[3] The RTC cites several cases to support the proposition that an appellate court may draw its own inferences from the record when interpreting contract or statutory language (Opp. Brief at 5). However, two of those cases involved language that was ruled to be unambiguous. *See United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961); *LTV Educ. Sys., Inc. v. Bell*, 862 F.2d 1168 (5th Cir. 1989). In the third case, the court resolved the ambiguous contract language by relying on evidence of acceptance by the buyer that had been presented at trial. *Lancaster Glass Corp. v. Philips ECG, Inc.*, 835 F.2d 652, 658-60 (6th Cir. 1987). Here, because no party had argued that the terms of the delegations

There are no such citations because the RTC neither made the argument adopted by the Court of Appeals nor adduced any evidence to support that argument (Pet. 14-18). The RTC does not deny these facts.

Second, although the RTC correctly points out that no other circuit has decided *exactly* this case (i.e., the necessary authorization for a repudiation decision by an official of the RTC), the RTC does not and cannot deny that the decision below is clearly contrary to the rule of law enunciated in the cases from other circuits cited by Petitioners on a fundamental and important issue of federal law — the requirement for express delegations of important governmental powers. *See* Pet. at 18-25. Thus, there *is* a conflict between the circuits that this Court should resolve concerning the requirement of explicit delegation of governmental powers.

Third, the RTC claims that "FIRREA contains no requirement or restriction regarding the RTC's repudiation authority." (Opp. Brief at 5.) But this is simply not true. FIRREA contains a clear delineation of how the powers of the RTC are to be delegated and exercised. FIRREA (as codified at the relevant time) created the Board of Directors of the RTC and vested that Board alone with the duty to prescribe "bylaws [for the corporation] that shall be consistent with law." 12 U.S.C. § 1441a(b)(10)(J). *See* App. C, 34a (quoting

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and bylaws were ambiguous, no such extrinsic evidence was ever presented or can be found in the record.

relevant section of FIRREA). The bylaws thus promulgated vest all the powers of the corporation, including the repudiation power, with the Board of Directors of the RTC. *Id.* (quoting relevant bylaw provisions). That authority was never delegated to the official by statute, regulation, Board resolution or otherwise. Thus, the instant case presents precisely the same questions concerning delegation as *United States v. Emerson*, 846 F.2d 541 (9th Cir. 1988), where, as here, there was no explicit statutory requirement for delegation by regulation.

Finally, although the RTC notes that the Court of Appeals did not consider the *formal* ratification of the repudiation decision in its ruling, by the RTC's own admission, the Court of Appeals *did* rely on the Board's "subsequent [i.e., after-the-fact] adoption of Roelle's decision." (Opp. Brief at 6.) Thus, the ruling of *FEC v. NRA* is relevant on ratification issues and the timeliness of ratification as well.[4]

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[4] Contrary to the RTC's assertion that there is no "allegation here that the ratification of Roelle's decision was untimely" (Opp. Brief at 8), Petitioners expressly have argued that the case must be remanded for a determination of whether the purported authorization event (which the Court of Appeals failed to identify) was performed within the "reasonable time" for repudiation mandated by statute and regulation. *See* Supplemental Brief at 6.

CONCLUSION

For the foregoing reasons and those set forth in the Petition and the Supplemental Briefs of Petitioners, Petitioners respectfully request that this Court grant the Petition for Certiorari on the merits, vacate the decision of the Court of Appeals and remand with instructions to dismiss the RTC's appeal. Alternatively, Petitioners request that this Court grant the Petition for Certiorari and remand the case for further consideration in light of *FEC v. NRA*.

March 6, 1995

Respectfully submitted,

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